SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 12

WILLIAM A. PRICE, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 17, 1960
CERTIORARI GRANTED JUNE 19, 1961

Supreme Court of the United States

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WILLIAM A. PRICE, PETITIONER

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[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13925

WILLIAM A. PRICE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Mr. Harry I. Rand, with whom *Mr. Leonard B. Boudin* was on the brief, for appellant.

Miss Doris H. Spangenburg, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Carl W. Belcher*, *Lewis Carroll*, *William Hitz*, and *Harold D. Rhynedance, Jr.*, Assistant United States Attorneys, were on the brief, for appellee. *Mr. John D. Lane*, Assistant United States Attorney, also entered an appearance before appellee.

Before WASHINGTON, BASTIAN and BURGER, *Circuit Judges.*

OPINION—Decided June 18, 1960

BURGER, *Circuit Judge*: Appellant was convicted in the District Court for contempt under 2 U.S.C. § 192 (1958) [fol. 2] for refusal to answer 8 questions [1] when he testi-

[1] Count One: "Are you, Mr. Price, a member of the Communist Party, U.S.A.?"
Count Two: "Have you ever attended Communist meetings?"
Count Three: "Do you, Mr. Price, know Marcella Hitschmannova?"
Count Four: "Did you, sir, fly a considerable mileage in Central America and Latin America?"
Count Five: "Is it not a fact, sir, that you did fly a privately owned airplane, as distinguished from a military or naval airplane—that you did so as a private citizen; that you flew in Latin and South America, and that during that

fied under subpoena before the Subcommittee on Internal Security, Senate Judiciary Committee. The hearings at which appellant testified were conducted pursuant to Senate Resolution 366 of the 81st Congress and Resolution 54 of the 84th Congress.*

Appellant appeared first in executive sessions of the Subcommittee and later in public sessions. At all times he was attended by counsel who was experienced in appearances before Congressional Committees conducting hearings of this general character. Appellant refused to answer the questions set forth in the indictment and explained his refusal in a prepared written statement which [fol. 3] he handed to the Subcommittee and counsel to be inserted in the record. From time to time he referred to the statement and embellished it as a basis for his refusal to answer questions. He consulted frequently with his counsel before responding or refusing to answer questions.

The District Court's opinion succinctly deals with the case and we affirm the conviction on the grounds relied on by that court. In pertinent part that opinion is as follows:

> First, I hold that the committee was duly constituted and vested with authority to function on the occasion in question; that at the time the defendant appeared the committee was inquiring into a matter within its authority and that it had before it a legitimate legislative purpose; that the questions put were pertinent to the matter under inquiry; that the ques-

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flight you had another person with you for a good part of the time?"

Count Six: "Who was the person who accompanied you on that lengthy flight in Latin and Central America?"

Count Seven: "When was it you made this lengthy trip to Latin and Central America?"

Count Eight: "Have you ever been a member of the Communist Party? I asked you once earlier if you are now a member, and I will ask you whether you have ever been a member of the Communist Party?"

* The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13464, Gojack v. United States, decided this day.

tions were not ambiguous in the light of what had transpired and in context; that the questions were properly put, and when there was a refusal to answer, after a statement as to why he refused, the defendant was directed to answer the questions, and he failed to do so.

I have no doubt that the defendant was properly informed as to the purpose and reason which brought him before the committee. The subpoena of the committee put him on notice. In addition to that, the very careful legalistic memorandum prepared before he appeared clearly indicated that he was so advised and had the assistance of extraordinary competent counsel. This Court, I might say, has had contact in a professional way with defendant's then counsel, Mr. Wittenberg, and personally knows him to be an able lawyer.

I will further hold that the questions put were not properly and timely answered; that, in fact, there was no direct and clear answer to the questions put; that the involved statement, made at a time substantially removed from the time the questions were put and in the manner in which the answer was made, was not truly responsive.

I believe that covers the necessary ingredients in the case; and they having been proved beyond a rea-
[fol. 4] sonable doubt, I do find the defendant guilty as to the counts set forth in the indictment in question: namely, Counts 1, 2, 3, 4, 5, 6, 7, and 8.

The formal statement relied on by appellant and filed with the Subcommittee warrants discussion in view of the comments of the Supreme Court in the *Barenblatt* case[2] concerning a statement filed by Barenblatt and containing recitals comparable to those in appellant's statement. Like Barenblatt, Price repeated that the Subcommittee could not lawfully inquire into his "political beliefs, [his] religious beliefs, or any other personal or private affairs and any associational activities." He cited various decisions of the courts which were also referred to in his prepared statement, expressly disclaiming reliance on the

[2] Barenblatt v. United States, 360 U.S. 109 (1959).

absolute bar of the Fifth Amendment. Similarly, as in *Barenblatt*, the lengthy prepared statement, drafted as we are told with the aid of counsel who sat at his side throughout the hearings, discloses a complete awareness of the Subcommittee's purposes and objectives and its authority. As the District Court pointed out in its opinion, the pertinency of the questions to this subject matter is shown in part by their content and context particularly when viewed in light of the prepared statement. Unlike Watkins, Price made no specific or even general challenge to pertinency; under *Watkins* v. *United States*, 354 U.S. 178 (1957), where the witness has an awareness of the subject matter he is not entitled to an automatic explanation of pertinency. Appellant's statement to the Committee disclosed familiarity with numerous pertinent judicial opinions relating to congressional investigations and the rights and duties of the Congress and the witness. The questions put to appellant as to appellant's own personal activities were "clear beyond doubt." *Barenblatt* v. *United States*, 360 U.S. 109 (1959). If indeed appellant's plane trip to South America was on a mission directed by the Communist Party, the Subcommittee was [fol. 5] entitled to know that fact and the identity of his passenger would be highly relevant if the passenger was disclosed to be a person known to the Subcommittee to be a Communist Party member, courier or organizer.

Appellant contends also that this inquiry was an impairment of the freedom of the press; that it impinged on appellant's First Amendment freedoms; that the Congress had no reasonable grounds to subpoena appellant as a witness; that his refusal to answer questions in executive sessions rendered him immune from prosecution for refusing to answer the same questions in public hearings; that the Subcommittee hearings were conducted while the Senate was in session and without express leave of the Senate; whether the indictment must recite the subject of the inquiry, the authority of the Subcommittee and the relation of the questions to the subject matter. Our discussion of these points in *Shelton* v. *United States*, No. 13737, and *Liveright* v. *United States*, No. 13871 (June 18, 1960), makes it unnecessary to deal in detail with these contentions here.

We also take note that assuming arguendo, but without conceding, some infirmity in the convictions with respect to certain of the counts of the indictment, Counts 1, 2, 7 and 8 are beyond any challenge and the sentences as to all 8 counts are concurrent.

Affirmed.

[fol. 6] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,925
Criminal 1216-56

WILLIAM A. PRICE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia.

Before: Washington, Bastian and Burger, Circuit Judges.

JUDGMENT—June 18, 1960

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Burger.

Dated: June 18, 1960.

[fol. 7] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 8]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1960

WILLIAM A. PRICE, PETITIONER

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—July 13, 1960

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

17th of August, 1960

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 13 day of July, 1960

[fol. 9]

SUPREME COURT OF THE UNITED STATES

No. 331, October Term, 1960

WILLIAM A. PRICE, PETITIONER

vs.

UNITED STATES

ORDER ALLOWING CERTIORARI—June 19, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 328.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 10]

SUPREME COURT OF THE UNITED STATES

No. 12, October Term, 1961

WILLIAM A. PRICE, PETITIONER

vs.

UNITED STATES

ORDER GRANTING MOTIONS TO DISPENSE WITH PRINTING THE RECORD AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS—October 9, 1961

ON CONSIDERATION of the motions to dispense with printing the record and for leave to proceed further herein in forma pauperis.

IT IS ORDERED by this Court that the said motions be, and the same are hereby, granted.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1950

No. 12

WILLIAM A. PRICE,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Supreme Court of the United States

October Term, 1960

No.

WILLIAM A. PRICE,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William A. Price respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 18, 1960, affirming petitioner's conviction in the United States District Court of the District of Columbia for contempt of Congress under 2 U. S. C. 192.

Opinions Below

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 138-142) has not yet been reported; it appears as Appendix A to this petition, *infra*, p. 15.

Jurisdiction

The judgment of the Court of Appeals was entered on June 18, 1960 (R. 143, Appendix B, *infra*, p. 20). On July 13, 1960, Mr. Justice Black extended the time to file this petition to August 17, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether Senate Resolution 366, 81st Cong., 2nd Sess., the charter of authority of the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate (hereafter "the Subcommittee"), is so vague as to invalidate the Subcommittee's power to compel testimony in the First Amendment area.

2. Whether, when petitioner failed to answer the questions as to which he has been convicted for contempt, the Subcommittee was engaged on a "topic under inquiry", sufficiently identified and of which petitioner was adequately apprised, within the requirements formulated by this Court in *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234; and *Barenblatt* v. *United States*, 360 U. S. 109.

3. Whether, in any event, the Government sustained the burden imposed on it by this Court in *United States* v. *Rumely*, 345 U. S. 41, and *Sinclair* v. *United States*, 279 U. S. 263, of showing that there was a particular "topic under inquiry" on which the Subcommittee was at that time engaged.

4. Whether the Government sustained the burden imposed on it by this Court in *Barenblatt* v. *United States*, *supra*, and *Sweezy* v. *United States*, *supra*, of showing why petitioner's right of privacy must yield to subordinating governmental interests.

5. Whether the Government sustained the burden imposed on it by this Court in those cases, of showing probable cause for the Subcommittee's summoning of petitioner as a witness and compelling his testimony in the First Amendment area.

6. Whether petitioner was denied the full and fair hearing and right of cross-examination guaranteed a de-

fendant in a criminal case by the Fifth and Sixth Amendments.

7. Whether the tribunal before which the contempts charged to petitioner were allegedly committed constituted a competent committee of the Senate within the purview of 2 U. S. C. 192, in light of the provision of section 134(c) of the Legislative Reorganization Act of 1946 that no Senate committee sit without special leave while the Senate is in session and the fact that the hearing here was held while the Senate was in session and without its special leave.

8. Whether an investigation by a Congressional committee into the content of newspapers, admittedly for the purpose of determining the manner in which public opinion was being influenced by such content, violates the freedom of press guaranteed by the First Amendment.

9. Whether petitioner was properly convicted under 2 U. S. C. 192, in view of the failure of the indictment to state (a) what the "topic under inquiry" before the Subcommittee was at the time of the alleged contempts, (b) how the questions with respect to which contempts were charged were pertinent to that subject matter, and (c) that petitioner's failure to answer them was willful.

10. Whether a defendant in a 2 U. S. C. 192 prosecution should be accorded the right to show the bias of Federal Government employee jurors and, on such a showing, to have an indictment returned by a grand jury composed in the majority of such jurors dismissed.

Constitutional Provisions, Statute and Resolution Involved

The Constitutional provisions involved are Article I, sections 1 and 9, clause 3; Article III, section 1; and the First, Fifth, Sixth, Ninth and Tenth Amendments.

The statutes involved are 2 U. S. C. 192, as amended (R. S. Sec. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) and 2 U. S. C. 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753, Title I, § 134 (c), 60 Stat. 832). Senate Resolution 366, 81st Cong., 2d Sess., is also involved. The statutes and resolution involved are set forth in Appendix C, *infra*, p. 21.

Statement of the Case

Petitioner, a newspaper reporter employed by the New York Daily News, was indicted on November 26, 1956, for refusal to answer eight questions at a hearing held on January 5, 1960, before a tribunal purportedly sitting as the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary of the United States Senate (hereinafter "the Subcommittee") (R. 1-2). Only three of the questions on their face relate to communist activities; the remaining five indictment questions do not (*Ibid.*). The Count 1 question inquired whether petitioner was at the time a member of the Communist Party; the Count 8 question whether he had ever been a member; and the Count 2 question whether he had ever attended "Communist meetings".* The Count 3 question inquired whether petitioner then knew one "Marcella Hitschmannova"; and the succeeding questions whether he had flown "a considerable mileage in Central America and Latin America"; whether he had flown "a privately owned airplane, as distinguished from a military or naval airplane

* In addition to the other reasons noted in this petition, the Count 8 question cannot serve as a basis for a contempt conviction in view of its remoteness in time (*Bowers* v. *United States*, 92 U. S. App. D. C. 79, 202 F. 2d 447); and the Count 2 question because it is objectionable for vagueness (*O'Connor* v. *U. S.*, 99 U. S. App. D. C. 373, 240 F. 2d 404; see *Scull* v. *Virginia*, 359 U. S. 344).

• • • as a private citizen • • • in Latin and South America • • • [with] another person with you for a good part of the time"; who was "the person who accompanied you on that lengthy flight in Latin and Central America"; and when it was "you made this lengthy trip to Latin and Central America" (R. 2).*

Subpoenas issued prior to the trial, at petitioner's request, directed the chief clerks of the Subcommittee and of its parent Committee on the Judiciary to produce all records in the files of both bodies relating to petitioner and to the person designated "Marcella Hitschmannova", and all minutes of both covering the proceedings in which petitioner's hearing was held, particularly those relating to the summoning of petitioner (R. 8-10). On the Government's motion, these subpoenas were quashed by the trial court (R. 48-49).

A jury having been waived, the case proceeded to trial before the court. The Government's chief and only material witness was Mr. Julian G. Sourwine, associate counsel of the Subcommittee. Mr. Sourwine first testified concerning petitioner's appearance before the Subcommittee. He admitted that the Subcommittee "had no information directly placing • • • [petitioner] in the Communist Party" (R. 55), but referred to other information allegedly in the Subcommittee files which, so he said, caused it to summon petitioner as a witness and testified as to the purported purposes of the Subcommittee's inquiry (R. 51-55, 65). A substantial part of the Subcommittee's information, Mr. Sourwine said, had come from a "confidential informant" (R. 52, 83, 93, 94).

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* As the court below pointed out in *Bowers* v. *United States*, *supra*, the "Do you know a certain person?" type of question such as was the subject of Count 3 cannot serve as basis for a contempt conviction. The other questions here are plainly objectionable for vagueness. *O'Connor* v. *United States*, *supra*; *Scull* v. *United States*, *supra*.

Although the trial court permitted Mr. Sourwine to testify freely as to this alleged information, it barred petitioner's cross-examination as to the sources of the information and denied his request for inspection of the data, in so far as in writing (R. 82-83, 93, 94-95, 97, 99-100, 100-103). Petitioner's motion that, in view of the court's rulings, Mr. Sourwine's testimony in this regard be stricken was denied (R. 83-84, 113).

Opening his case, petitioner vainly reiterated his request for enforcement of the subpoenas previously quashed (R. 134). From the subpoenaed materials, petitioner offered to prove *inter alia* that the real purposes of the Subcommittee's inquiry were to control and fix the standards of employment of newspaper reporters and to influence the character and content of newspaper reporting, that it also desired in its investigation of petitioner to harass him and expose him to the contempt of the public and his associates, and that the Subcommittee was not acting with the least possible power in pursuance of any legislative function (R. 135-136). At the conclusion of the trial, the court found that the Subcommittee was duly constituted and inquiring into matters within its authority and for a legitimate legislative purpose, that the indictment questions were pertinent to the matter under inquiry and not ambiguous, that petitioner refused to answer them, and that he was properly informed by the subpoena of the purpose and reason for the Subcommittee's summoning of him (R. 136-137). The trial court, however, did not itself state the nature of the subject matter under inquiry. On these findings, the court held petitioner guilty on all counts of the indictment and on April 12, 1957, entered its judgment and imposed a sentence of $500 fine and three months imprisonment (R. 137, 11).

Notice of appeal to the Court of Appeals was filed on April 12, 1957 (R. 12). Before hearing argument, that Court awaited this Court's ruling in *Barenblatt* v. *United*

States, 360 U. S. 109. On June 18, 1960, the Court of Appeals affirmed petitioner's conviction (R. 143). Subsequently, it entered orders staying transmission of its judgment to the trial court pending the filing of this petition.

Reasons for Granting the Writ

1. This case presents to this Court the question whether Senate Resolution 366, 81st Cong., 2d Sess. (Appendix C, *infra*, p. 21), the grant of authority to the Internal Security Subcommittee of the Senate, is so vague as to invalidate that Subcommittee's power to compel testimony in the First Amendment area. This is the same question presented by the case of *Liveright* v. *United States*, in which a petition for a writ of certiorari is now pending. For a detailed statement of this question and as to the importance of its resolution by this Court, petitioner incorporates and respectfully refers the Court to the *Liveright* petition, pp. 7-9 *.

2. This case also presents the important question whether, when they indulge in an investigation intruding into the First Amendment area, Congressional committees must engage on a specifically delimited subject of inquiry, which is communicated to the witness, rather than on merely a general, roving inquisition. This Court's prior decisions appear to require such a particularization of subject matter; the court below is of a contrary view. Resolution of the problem is vital to protection of First Amendment freedoms.

Here, again, this same question is presented in *Liveright* v. *United States*, *supra;* and petitioner incorporates and

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* In view of the similarity of the instant case to the *Liveright* case, petitioner, in order to save expenses of printing, will, wherever appropriate, incorporate and refer the Court to portions of the petition in *Liveright*. Petitioner respectfully asks that the Court indulge him in this practice.

respectfully refers the Court to the discussion of the question in the *Liveright* petition, pp. 9-13. Here, too, petitioner was at no time sufficiently apprised of "the topic under inquiry" because the Subcommittee's investigation was not in the framework of any such specific inquiry. Mr. Sourwine, the Subcommittee's counsel, admitted at the trial that petitioner had never been told what the subject matter of the hearing was (R. 112-113). When, early in the hearing, petitioner inquired why a particular question was put, he was told that it was "to qualify you as a person of whom we can ask questions with respect to the persons who were on * * * [a Newspaper Guild] slate and the manner in which that slate was supported" (R. 18-19). But none of the indictment questions are relevant to such matters. And except for this, there was no indication to petitioner of the particular nature of the investigation.

That the Subcommittee was not limiting itself to any specific subject is plain from the disparate definitions of subject matter subsequently suggested by Mr. Sourwine at the trial (R. 54, 61-63, 84, 85). Indeed, the Government prosecutor conceded there was no specific "topic under inquiry". Rather, he said, the subject of the Subcommittee's investigation in this case was co-extensive with and no more particular than the broad powers set forth in Senate Resolution 366 (R. 130-133, *passim*), devoted to the primary purpose of locating "Communists" wherever they might be found (R. 133-134). And the trial court accepted the Government's position in this respect (R. 136).

It is noteworthy that neither of the lower courts (the Court of Appeals adopting the trial court's opinion, Appendix A, *infra*, pp. 17-18) has favored us with a statement as to just what, in its view, the "topic under inquiry" was, notwithstanding its readiness to charge petitioner with such knowledge because he had the temerity at the

hearing to read a long statement of objections prepared for him by his attorney.*

The short of the matter is that in the *Price* hearing, as in the *Liveright* hearing, the Subcommittee considered it quite unnecessary to limit its investigation to any particular "topic under inquiry". For, both hearings were held prior to this Court's rulings in *Watkins* v. *United States*, 354 U. S. 178, and *Barenblatt*, 360 U. S. 109, and so before the necessity for particularization of subject matter to justify Congressional intrusion into the First Amendment area had been made clear. The Subcommittee was here embarked, as it was then wont to do, on a roving inquiry under its diffuse charter of power. The belated and abortive effort of the court below to derive a "topic under inquiry" from this record is but another attempt at a post-*Watkins* reformation.

Review by this Court is necessary to correct the error below and to assure that the guides formulated in *Watkins* and *Barenblatt* are properly applied.

3. The decision below also presents the question whether in connection with his futile efforts at the trial to prove that there was no justification for the Subcommittee's in-

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* The Court of Appeals says: "If indeed appellant's [petitioner's] plane trip to South America was on a mission directed by the Communist Party, the Subcommittee was entitled to know that fact and the identity of his passenger would be highly relevant if the passenger was disclosed to be a person known to the Subcommittee to be a Communist Party member, courier or organizer." (Appendix A, *infra*, p. 19). But this "iffy" statement is of no help whatever in defining a "topic under inquiry" and suggests merely that persons taking plane trips to South America do so at the risk of Congressional investigation. The Subcommittee admittedly "had no information directly placing * * * [petitioner] in the Communist Party" (R. 55), at no time obtained any such information with respect to him (R. 85), and already had petitioner's sworn statement unequivocally denying participation in any Communist or espionage activities in connection wtih his plane trip to Latin America (R. 78-79).

quiry, petitioner was denied the full and fair hearing and right of cross-examination that the Fifth and Sixth Amendments accord; and, beyond that, important questions as to the quantum of proof which the Government must adduce to justify subordination of the individual's interest in privacy of belief, opinion and association to that of the state in investigating in aid of legislation and as to the nature and extent of the "probable cause" which, as *Barenblatt* (360 U. S. at 134) emphasized, must exist to tip the scales in favor of the state. These several questions are likewise presented in *Liveright, supra,* and petitioner incorporates and respectfully refers the Court to the pertinent discussion in the *Liveright* petition, pp. 13-15.

Neither the court below nor the trial court has pointed to any weighty national interests which could have been served by the investigation of petitioner. The record certainly discloses none. Although the trial court, over petitioner's objection, permitted the Government witness, Mr. Sourwine, freely to testify as to the purported information which led to the summoning and interrogation of petitioner (see R. 51-55), the court quashed subpoenas directed to the Subcommittee and its parent committee to produce such information, if any there was, and barred petitioner from cross-examining as to its sources or inspecting it (R. 10, 48-49, 82-83, 93-95, 98, 99-100).

For the same reasons noted in the *Liveright* petition (pp. 14-15), this case is quite different from *Barenblatt.* Here not only was no evidence offered of petitioner's participation in Communist activities, but the Subcommittee admittedly had no information placing him in the Communist Party (R. 55). The information which it did have, Mr. Sourwine said, had come from confidential sources; but petitioner was barred from inquiring into these sources. Thus, the trial court effectively precluded petitioner from examining into the credibility of the chief and only material Government witness and his alleged and

anonymous informant and into the purported reasons for the Subcommittee's summoning of petitioner and its interest in and need for interrogating him as to his private affairs.

Here, once more, the court below has sanctioned the invasion of First Amendment rights on the basis of the mere surmise and *ipse dixit* of a Congressional committee's counsel, immunized even from cross-examination, as to the existence of "probable cause", a matter whose significance *Barenblatt* made plain. Review by this Court is urgent to avoid this further unwarranted extension of the *Barenblatt* ruling made in disregard of the caveats clearly enunciated in that case.

4. This case further presents a question as to the construction of section 134(c) of the Legislative Reorganization Act of 1946 (Appendix C, *infra*, p. 21), which prohibits the holding of Senate committee hearings without special leave while the Senate is in session. The hearing at which petitioner allegedly committed contempt, however, was held while the Senate was in session and without its special leave (R. 111-112). The tribunal before which petitioner was charged with contempt consequently was not a competent committee and so cannot "be the instrument of criminal conviction". *Christoffel* v. *United States*, 338 U. S. 84, 90.

For a discussion of this point, petitioner incorporates and respectfully refers the Court to the statement in the *Liveright* petition, pp. 16-17.

5. In *Barenblatt*, the Court held that the mandate of the House Committee on Un-American Activities as it was applied in an investigation of communism in the field of education did not violate the First Amendment. While reserving our objections to that doctrine, it clearly does not support the ruling below. As already noted, the record does not disclose nor are we aware of the "topic under inquiry" here. The court below, however, by incorporating

its opinions in *Shelton* v. *United States*, No. 13737, C. A. D. C., June 18, 1960, pet. cert. pend'g., No. 246, O. T. 1960; and *Liveright* v. *United States*, *supra*, (see Appendix A, *infra*, p. 19), suggests that the subject matter of the investigation in this case was one into "efforts to influence American public opinion and the specific effort to use the press to implement these objectives" (*Shelton*, slip op. 7) or one into the "Communist Party strategy of placing its disciples in key positions in the fields of communications, newsgathering and reporting, education and other areas in which public opinion could be influenced" (*Liveright*, slip op. 6). Neither the Court of Appeals nor the trial court made any further inquiry into whether there were special circumstances as to petitioner which would justify holding that such an investigation was within the Subcommittee's power.*

When Federal courts so uncritically uphold a Congressional investigation into "efforts to influence American public opinion" and "areas in which public opinion could be influenced" by newspapers and other communications media, we submit it is urgent that this Court reexamine the *Barenblatt* doctrine and, at the very least, promptly place restrictions upon so radical an extension of the doctrine. For, to read Senate Resolution 366 so broadly is plainly to "violate the freedoms guaranteed by

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* The Subcommittee, of course, had no doubt of its authority generally to investigate into the content of press and other communications media. In a subsequent report as to this very inquiry, the Subcommittee stated, with respect to the nature of the investigation (Sen. Rep. 131, 84th Cong., 2d Sess.):

> "* * * Communists have made vigorous and sustained efforts to influence the American press and radio and to entrench their members in all other forms of mass communications, where, by *emphasis or omission of the written or spoken word*, it may be turned to the advantage of the conspiracy." (Emphasis supplied.)

the First Amendment—freedom to speak, publish and petition the Government". *United States* v. *Harriss*, 347 U. S. 612, 625; *United States* v. *Rumely*, 345 U. S. 41. As Mr. Walter Lippman observed at the very time petitioner and his fellow newspaper men were being questioned: "* * * In what former generation, if ever before in our history, has the Government claimed the power to examine and to pass judgment upon who shall work on newspapers? * * * Once it is the accepted principle that Congress has power to set up standards of newspaper employment, the inner spirit and the practical meaning of the First Amendment will be deeply impaired." N. Y. Herald Tribune, January 10, 1956. In these respects, the decision below in this case conflicts in principle with the *Harriss* and *Rumely* cases.

6. Finally, this case presents the two important problems, recurring in prosecutions under 2 U. S. C. 192, and also presented in *Liveright*, *supra*, relating to the form of the indictment and the presence of biased Federal Government employee jurors on the Grand Jury returning the indictment. As to these questions, petitioner incorporates and respectfully refers the Court to the statement in the *Liveright* petition, pp. 18-19.

7. In the instant case, even as in *Liveright* v. *United States*, *supra*, the propriety of the issuance of a writ is underlined by the grants of certiorari in *Wilkinson* v. *United States*, No. 37, O. T. 1960, and *Braden* v. *United States*, No. 54, O. T. 1960; and its importance is emphasized by the pendency of petitions in the other contempt of Congress cases decided by the court below on the same day as the instant case. See the *Liveright* petition, pp. 19-20.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

Appendix A

(Opinion of United States Court of Appeals for the District of Columbia Circuit)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13925

WILLIAM A. PRICE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 18, 1960

MR. HARRY I. RAND, with whom MR. LEONARD B. BOUDIN was on the brief, for appellant.

MISS DORIS H. SPANGENBURG, Assistant United States Attorney, with whom MESSRS. OLIVER GASCH, United States Attorney, CARL W. BELCHER, LEWIS CARROLL, WILLIAM HITZ, and HAROLD D. RHYNEDANCE, JR., Assistant United States Attorneys, were on the brief, for appellee. MR. JOHN D. LANE, Assistant United States Attorney, also entered an appearance for appellee.

Before:

WASHINGTON, BASTIAN and BURGER,

Circuit Judges.

BURGER, *Circuit Judge*:

Appellant was convicted in the District Court for contempt under 2 U. S. C. § 192 (1958) for refusal to answer 8 questions [1] when he testified under subpoena before the Subcommittee on Internal Security, Senate Judiciary Committee. The hearings at which appellant testified were conducted pursuant to Senate Resolution 366 of the 81st Congress and Resolution 54 of the 84th Congress.*

Appellant appeared first in executive sessions of the Subcommittee and later in public sessions. At all times he was attended by counsel who was experienced in appearances before Congressional Committees conducting hearings of this general character. Appellant refused to answer the questions set forth in the indictment and explained his refusal in a prepared written statement which

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[1] Count One: "Are you, Mr. Price, a member of the Communist Party, U. S. A.?"

Count Two: "Have you ever attended Communist meetings?"

Count Three: "Do you, Mr. Price, know Marcella Hitschmanova?"

Count Four: "Did you, sir, fly a considerable mileage in Central America and Latin America?"

Count Five: "Is it not a fact, sir, that you did fly a privately owned airplane, as distinguished from a military or naval airplane—that you did so as a private citizen; that you flew in Latin and South America, and that during that flight you had another person with you for a good part of the time?"

Count Six: "Who was the person who accompanied you on that lengthy flight in Latin and Central America?"

Count Seven: "When was it you made this lengthy trip to Latin and Central America?"

Count Eight: "Have you ever been a member of the Communist Party? I asked you once earlier if you are now a member, and I will ask you whether you have ever been a member of the Communist Party?"

* The circumstances under which the appeals in this case and seven other contempt of Congress cases came on for hearing in this court appear in footnote 2 of the opinion in No. 13464, Gojack v. United States, decided this day.

he handed to the Subcommittee and counsel to be inserted in the record. From time to time he referred to the statement and embellished it as a basis for his refusal to answer questions. He consulted frequently with his counsel before responding or refusing to answer questions.

The District Court's opinion succintly deals with the case and we affirm the conviction on the grounds relied on by that court. In pertinent part that opinion is as follows:

> First, I hold that the committee was duly constituted and vested with authority to function on the occasion in question; that at the time the defendant appeared the committee was inquiring into a matter within its authority and that it had before it a legitimate legislative purpose; that the questions put were pertinent to the matter under inquiry; that the questions were not ambiguous in the light of what had transpired and in context; that the questions were properly put, and when there was a refusal to answer, after a statement as to why he refused, the defendant was directed to answer the questions, and he failed to do so.
>
> I have no doubt that the defendant was properly informed as to the purpose and reason which brought him before the committee. The subpoena of the committee put him on notice. In addition to that, the very careful legalistic memorandum prepared before he appeared clearly indicated that he was so advised and had the assistance of extraordinarily competent counsel. This Court, I might say, has had contact in a professional way with defendant's then counsel, Mr. Wittenberg, and personally knows him to be an able lawyer.
>
> I will further hold that the questions put were not properly and timely answered; that, in fact, there was no direct and clear answer to the questions put;

that the involved statement, made at a time substantially removed from the time the questions were put and in the manner in which the answer was made, was not truly responsive.

I believe that covers the necessary ingredients in the case; and they having been proved beyond a reasonable doubt, I do find the defendant guilty as to the counts set forth in the indictment in question: namely, Counts 1, 2, 3, 4, 5, 6, 7, and 8.

The formal statement relied on by appellant and filed with the Subcommittee warrants discussion in view of the comments of the Supreme Court in the *Barenblatt* case [2] concerning a statement filed by Barenblatt and containing recitals comparable to those in appellant's statement. Like Barenblatt, Price repeated that the Subcommittee could not lawfully inquire into his "political beliefs, [his] religious beliefs, or any other personal or private affairs and any association activities." He cited various decisions of the courts which were also referred to in his prepared statement, expressly disclaiming reliance on the absolute bar of the Fifth Amendment. Similarly, as in *Barenblatt*, the lengthy prepared statement, drafted as we are told with the aid of counsel who sat at his side throughout the hearings, discloses a complete awareness of the Subcommittee's purposes and objectives and its authority. As the District Court pointed out in its opinion, the pertinency of the questions to this subject matter is shown in part by their content and context particularly when viewed in light of the prepared statement. Unlike Watkins, Price made no specific or even general challenge to pertinency; under *Watkins* v. *United States*, 354 U. S. 178 (1957), where the witness has an awareness of the subject matter he is not entitled to an automatic explanation of pertinency. Appellant's statement to the Committee disclosed familiarity with numerous pertinent

[2] Barenblatt v. United States, 360 U. S. 109 (1959).

judicial opinions relating to congressional investigations and the rights and duties of the Congress and the witness. The questions put to appellant as to appellant's own personal activities were "clear beyond doubt." *Barenblatt* v. *United States,* 360 U. S. 109 (1959). If indeed appellant's plane trip to South America was on a mission directed by the Communist Party, the Subcommittee was entitled to know that fact and the identity of his passenger would be highly relevant if the passenger was disclosed to be a person known to the Subcommittee to be a Communist Party member, courier or organizer.

Appellant contends also that this inquiry was an impairment of the freedom of the press; that it impinged on appellant's First Amendment freedoms; that the Congress had no reasonable grounds to subpoena appellant as a witness; that his refusal to answer questions in executive sessions rendered him immune from prosecution for refusing to answer the same questions in public hearings; that the Subcommittee hearings were conducted while the Senate was in session and without express leave of the Senate; whether the indictment must recite the subject of the inquiry, the authority of the Subcommittee and the relation of the questions to the subject matter. Our discussion of these points in *Shelton* v. *United States,* No. 13737, and *Liveright* v. *United States,* No. 13871 (June 18, 1960), makes it unnecessary to deal in detail with these contentions here.

We also take note that assuming arguendo, but without conceding, some infirmity in the convictions with respect to certain of the counts of the indictment, Counts 1, 2, 7 and 8 are beyond any challenge and the sentences as to all 8 counts are concurrent.

Affirmed.

Appendix B

(Judgment)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 13,925
September Term, 1959
CRIMINAL 1216—56

WILLIAM A. PRICE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

United States Court of Appeals
for the
District of Columbia
Circuit
Filed Jun 18 1960
Joseph W. Stewart
Clerk.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before:

WASHINGTON, BASTIAN and BURGER,
Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge BURGER.

Dated: June 18, 1960.

Appendix C

(Statutory Provisions Involved)

2 U. S. C. 192 (R. S. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) reads, as follows:

> "Refusal of witness to testify
>
> "Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

2 U. S. C. 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753 Title I, § 134 (c), 60 Stat. 832) reads, in pertinent part, as follows

> "Authority of Senate standing committees and subcommittees; sitting while Senate or House in session
>
> • • •
>
> "(b) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

(Senate Resolution Involved)

Senate Resolution 366, 81st Cong. 2d Sess., reads as follows:

> "Whereas the Congress from time to time has enacted laws designed to protect the internal security

of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"RESOLVED, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 331

WILLIAM A. PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 15–19) has not yet been reported. The opinion of the district court (J.A. 136–137; Pet. 17–18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (Pet. 20). On July 13, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including August 17, 1960, and the petition was filed on August 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366 of the 81st Congress is sufficiently clear to authorize the Internal Security Subcommittee to ask the questions which petitioner refused to answer.

2. Whether the Subcommittee was legally authorized to hold the particular hearing at which petitioner was questioned in view of the provisions of the Legislative Reorganization Act of 1946 that no committee can sit without special leave while the Senate is in session.

3. Whether the First Amendment protected petitioner in refusing to answer the questions.

4. Whether, when petitioner appeared before the Subcommittee, he raised the issue of pertinency so as to require the Subcommittee to apprise him of the subject under inquiry and the pertinency of the questions to this subject.

5. Whether the indictment was invalid because it did not specify the subject under inquiry or the pertinency of the questions to that subject, and did not allege that petitioner's failure to answer was wilful.

6. Whether petitioner, who was indicted by a grand jury composed, in part, of Federal Government employees, is entitled to a hearing on general allegations that such jurors are biased as a result of the government security program.

7. Whether the rulings of the trial court denied petitioner the right of cross-examination and a fair trial.

STATUTES AND RESOLUTION INVOLVED

Relevant portions of 2 U.S.C. 192, as amended; the Legislative Reorganization Act of (August 2,) 1946, c. 753, Title I, Section 134, 60 Stat. 832 (2 U.S.C. 190b(b)); and Senate Resolution 366, 81st Cong., 2d Sess., are set forth in Appendix C to the petition, pages 21–22. In addition, Section 2 of the Resolution states:

> The Committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate * * *.

STATEMENT

Petitioner was charged in an eight-count indictment in the District Court for the District of Columbia with having refused, in violation of 2 U.S.C. 192, to answer eight questions, pertinent to matters under inquiry, put to him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 1). Having waived his right to trial by jury, petitioner was found guilty by the district court on all eight counts. He was sentenced to three months' imprisonment and to pay a fine of five hundred dollars (J.A. 11). On appeal, petitioner's conviction was affirmed[1] (Pet. 20).

[1] The court of appeals delayed argument and determination of this case, along with seven other contempt of Congress cases, until after this Court's decision in *Barenblatt* v. *United States*, 360 U.S. 109. Petitions for certiorari have been filed in all six cases in which the convictions were affirmed. See the Government's Brief in Opposition in *Deutch* v. *United States*, No. 233, this Term, pp. 8–9.

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Subcommittee, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws, heard Winston Burdett, a newspaperman and broadcaster, who had been a member of the Communist Party from 1937 until the early 1940's, testify concerning Communist infiltration of communications media.[2] He stated that, after he had become a Party member, Party leaders had induced him to become a foreign correspondent for a major American newspaper and to use that position as a cover for military espionage for the Soviet Union. Subsequently, the Subcommittee convened hearings to explore matters stemming from Mr. Burdett's testimony (Hearings, Part 17, p. 1587).

Julian G. Sourwine, counsel of the Subcommittee, a member of the staff of the Committee on the Judiciary for more than ten years, testified with reference to the information the Subcommittee possessed which caused petitioner to be subpoenaed. The Subcommittee had information that petitioner, a newspaperman, had been a candidate for vice president of the New York Newspaper Guild in 1949 on the so-called "Rank and File" ticket, which was known to be the Communist-supported ticket or slate (J.A. 50–51, 100–101), and that Communists had successfully infiltrated the Guild (J.A. 53, 100–102). According to Mr. Sour-

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[2] Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate (hereinafter "Hearings"), 84th Cong., 1st Sess., Part 14, pp. 1323–1363.

wine, the Subcommittee knew that a statement in defense of the Communist Party appeared in the "Daily Worker" in 1941 and had been signed by a William Price (J.A. 53); that petitioner had received numerous visits from Marcella Hitschmannova, who was known to be a Communist courier and to have served the Communist movement in other capacities for years (J.A. 52–53, 65, 96–97);[3] that these visits were continuing up until the time petitioner was called as a witness (J.A. 65); that petitioner, after returning from wartime naval service, had flown an airplane on a trip to Central and South America, during which time he was accompanied by a courier for the Communist Party (J.A. 54–55, 65). The Subcommittee, however, had no information that directly showed petitioner to be a member of the Communist Party (J.A. 55).

On the basis of this information, the Subcommittee decided to call petitioner as a witness in executive session. Pursuant to subpoena, petitioner, together with counsel, appeared and testified at such a session held in New York City on December 7, 1955 (J.A. 55). At the executive session, petitioner initially answered several questions as to his identity and background (J.A. 72–74), but refused to furnish any information sought by the Subcommittee concerning the information possessed by the Subcommittee which is described above (J.A. 76–79).

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[3] The Subcommittee also had other information concerning petitioner and Marcella Hitschmannova which could not be described at the trial because of its highly confidential nature (J.A. 52, 54–55).

Petitioner refused to answer these questions on the basis of a lengthy legal memorandum (Gov. Ex. 3; J.A. 25–34). Petitioner's objection was that the Subcommittee was invading "my political beliefs, my religious beliefs, any other personal and private affairs, and my associational activities" protected by the First Amendment (J.A. 26). His remaining objections were based on separation of powers and the bill of attainder clause of the Constitution.

After petitioner had completed his testimony in executive session, the Subcommittee and its counsel were convinced that petitioner possessed information which he was withholding and, further, that such information would be useful to the Subcommittee in its investigation. This conviction was predicated upon a number of factors, such as the actual testimony given, the testimony apparently withheld, the manner in which petitioner withheld it, his "constant conferring with counsel about the questions which a man who had no information would find no difficulty in answering promptly," and his demeanor during the questioning (J.A. 85–86). The Subcommittee and its counsel were hopeful that petitioner, "if we called him back and went at it right, would come clean and give the committee the information that we wanted," as had other witnesses before the Subcommittee in other instances (J.A. 90). The Subcommittee believed that petitioner "had information which if true made it clear that Mr. Price had a great deal of information

over and above and beyond what we had, which would be of value to the committee" (J.A. 90–91).[4]

On January 4, 5, and 6, 1956, the Subcommittee held public hearings to continue its inquiry into Communist infiltration into the American press. At the start of these hearings on January 4, the Chairman stated (Hearings, Part 17, p. 1587):[5]

> The subcommittee could not be unmindful of the fact that among the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. These facts did not in any way decrease the importance of carrying forward the investigation with diligence, care, and devotion to duty. The present hearings open up as a subsequent chapter to the Burdett testimony of June 28 and 29, 1955.

Senator Hennings then declared that the inquiry was "not in any sense an attack upon the free press of the United States," that "the committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency," and that the inquiry was "not an attack upon any one

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[4] The importance the Subcommittee placed on information believed to be possessed by petitioner can be seen from the references to petitioner in the annual report of the parent Committee. S. Rep. 131, 85th Cong., 1st Sess., pp. 4, 102–103, 238, 242, 250, 253–255.

[5] Part 17 of the Hearings was introduced at the trial as Government Exhibit 8.

newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press" (*id.*, p. 1588). The Chairman concurred in this statement and then reiterated (*ibid.*):

> We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

Petitioner, together with the same counsel who had represented him at the time of the executive session, appeared before the Subcommittee on the next day, January 5, 1956. Petitioner testified concerning his employment as a newspaper reporter and past service as a naval aviator (J.A. 17–18). He refused to answer whether he had been a candidate for vice president on the "Rank and File" slate of the New York Newspaper Guild in 1949 (J.A. 18–19). This refusal, as well as petitioner's subsequent refusal to answer other questions, was based upon the same legal memorandum which he had submitted to the Subcommittee at the executive session (J.A. 19).

Petitioner was then asked whether he was at that time a member of the Communist Party (count 1) (J.A. 23). Petitioner, after consultation with his counsel, refused to answer the question on the basis

of the written memorandum which he relied on at the executive session, and "further on the grounds that no legislative purpose can be served by asking me, at this time again, questions, the answers to which this committee knows full well from the executive hearings" (J.A. 23). Petitioner likewise refused to answer whether he had "ever attended Communist meetings" (count 2) (J.A. 35):

> * * * on the grounds stated in my objection and on the further grounds that no legislative purpose can be served by asking this question again, inasmuch as the reply has already been elicited by this committee in executive session.

For these same reasons, petitioner refused to answer whether he knew Marcella Hitschmannova (count 3) (J.A. 36). The Subcommittee's counsel then informed petitioner of the Subcommittee's interest in the subject of this question: "Do you know, Mr. Price, that one Marcella Hitschmannova, now connected with the United Nations, was a courier for the Communist Party?" (J.A. 36). Petitioner persisted in his refusal (J.A. 37).

Petitioner declined to answer a question as to whether he had ever flown an airplane for or at the direction of the Communist Party. His refusal was based on his previously stated grounds and for the reason that he answered such a question in the executive session (J.A. 38). When asked whether he had ever flown outside the continental limits of the United States, he admitted that he had done so as a pilot for the United States Navy (J.A. 39). Upon being confronted with the transcript of the executive session—where he initially answered this question in the nega-

tive, and upon being informed of the reason for the question, then refused to answer—petitioner contested the accuracy of the record (J.A. 40). After a colloquy at the public session between petitioner and the Chairman, petitioner ultimately admitted without qualification that he had flown outside the continental limits of the United States (J.A. 41).

Thereupon, petitioner was asked whether he had ever flown "considerable mileage in Central America and Latin America" (count 4). He refused to answer "on the grounds previously stated" (J.A. 41). For the same reason he refused to answer whether he had flown a privately owned airplane in South America and had another person along with him (count 5) (J.A. 41–42). Asked whether the person who accompanied him on that trip was a courier for the Communist International, petitioner at first noted that a similar question had been asked of him in the prior executive session (J.A. 42). Upon being directed to answer, petitioner responded by giving his answer in the negative (J.A. 42). Thereupon, the Subcommittee inquired (count 6) (J.A. 43):

> For the sake of testing the credibility of your answer to that question, I ask you this: Who was the person who accompanied you on that lengthy flight in Latin and Central America?

Petitioner stated that he "would like to know what right the committee has in testing my credibility" (J.A. 43). Upon being directed to answer the question, petitioner refused "on the same grounds as previously stated" (J.A. 43). He disclaimed any claim of right or privilege under the Fifth Amendment (J.A. 43).

As the public session was about to close, petitioner made a lengthy statement in which he denied that he had (J.A. 44):

> * * * ever been involved in such an activity as suggested here in any way whatsoever at anyone's direction, at the direction of any of the organizations as were mentioned in the closed hearings, or any such organizations; that anyone who ever flew with me was ever engaged in such an activity; that I ever had knowledge of such activity; or that I was ever approached to participate in such an activity; * * *.

The counsel for the Subcommittee then stated (J.A. 44):

> I think, in view of this question, Mr. Chairman, this statement by the witness again, we should have a question, or perhaps several questions, going to the credibility of the statement.

Committee counsel then asked petitioner when he had "made this lengthy trip to Latin and Central America" (count 7) (J.A. 44). Petitioner declined to answer the question "on the grounds stated in the objection, and on the additional grounds that my credibility as a witness is not at question here" (J.A. 44).

Petitioner thereafter answered a series of further questions related to his unsolicited statement, admitting only that he had taken a trip to South America at his own direction in order to sell an aircraft and to do some free-lance stories along the way (J.A. 45). He testified that the airplane was his own and that he sold it to someone whose name he did not recall in Panama City who he believed was a resident of Panama or a United States resident

of the Canal Zone. Petitioner also testified that he contacted the buyer through an advertisement in a Panama City newspaper, and that he went to Panama to sell the airplane because he had heard there was a good market for airplanes in Central America (J.A. 45–47). Finally, petitioner was asked and refused to answer whether he had ever been a member of the Communist Party (count 8) (J.A. 47).

ARGUMENT*

1. Petitioner contends (Pet. 7) that "the grant of authority to the [Subcommittee] is so vague as to invalidate the Subcommittee's power to compel testimony in the First Amendment area." It is clear from the statements of the Subcommittee's Chairman and another member of the Subcommittee that, at the time petitioner appeared in public session, the Subcommittee was investigating Communist infiltration of the press (see the Statement, *supra*, pp. 7–8). As we show in our Brief in Opposition (pp. 9–12) in *Whitman* v. *United States*, No. 303, this Term, pending on petition for a writ of certiorari, Senate Resolution 366, 81st Cong., 2d Sess., clearly authorizes the Subcommittee to investigate this subject.

2. Petitioner asserts (Pet. 11) that the Subcommittee, when petitioner appeared before it, was not

* Petitioner's contentions are generally the same as those in *Liveright* v. *United States*, No. 328, this Term, pending on petition for a writ of certiorari. Therefore, this brief will refer to our Brief in Opposition in *Liveright* except where the issues involve the particular facts of this case or where our Brief in Opposition in *Liveright* itself refers to another brief.

a competent tribunal because the Legislative Reorganization Act of 1946 (see Pet. 21) provides that "[n]o standing committee of the Senate * * * shall sit, without special leave, while the Senate * * * is in session." As we show in our Brief in Opposition (pp. 11–12) in *Liveright* v. *United States*, No. 328, this contention is without merit because, first, petitioner failed to object to the constitution of the Subcommittee when he appeared before it (see *United States* v. *Bryan*, 339 U.S. 323, 330–335) and, second, Section 2 of Senate Resolution 366, *supra*, p. 3, specifically provides that the Subcommittee may sit while the Senate is in session.

3. Petitioner argues (Pet. 2, 9–11, 11–13) that his rights under the First Amendment were violated because the Subcommittee was investigating Communist infiltration of newspapers, the government failed to show probable cause for compelling petitioner to testify, and the government failed to show why petitioner's right of privacy must be subordinated to governmental interests. Application, however, of the rulings of this Court in *Barenblatt* v. *United States*, 360 U.S. 109, to the facts of this case demonstrates that petitioner's claims cannot be sustained.

First, *Barenblatt* decided that congressional committees can investigate Communist infiltration of education, an area likewise protected by the First Amendment. It therefore follows that the Subcommittee's investigation of Communist infiltration of the press is not constitutionally prohibited. Second, the Court suggested in *Barenblatt* that congressional committees cannot engage in "indiscriminate dragnet procedures,

lacking in probable cause for belief that [the witness] possessed information which might be helpful to the Subcommittee." 360 U.S. at 134. But the evidence in this case shows that, before petitioner was called to testify, the Subcommittee had considerable information about petitioner's participation in Communist or Communist-supported activities and close association with two Communist couriers even though no evidence directly showed petitioner to be a Party member (see the Statement, *supra*, pp. 4–5). From this information, the Subcommittee had probable cause to believe that petitioner could contribute to its investigation. Even if petitioner himself turned out not to be a Party member, he could likely provide the Subcommittee with information on Communist activities and persons with whom he had been connected. And, lastly, the Subcommittee's knowledge of Communist infiltration of the press (see the Statement, *supra*, p. 4)—which was confirmed by the testimony of other witnesses at the hearing at which petitioner appeared (Hearings, Part 17, pp. 1636, 1638–1640, 1739–1740, 1777, 1779)—coupled with its probable cause for belief that petitioner possessed information on this subject, clearly justifies the same conclusion this Court found in *Barenblatt*. "[T]he balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended." 360 U.S. at 134.

4. Petitioner argues (Pet. 7–9) that, at the time he appeared before it, the Subcommittee was not en-

gaged in a subject under inquiry which was sufficiently identified and of which petitioner was adequately apprised.

The record clearly shows that, at the outset of the hearings on January 4, the Chairman of the Subcommittee and Senator Hennings stated repeatedly that the subject of the hearing was Communist infiltration of the press. These statements, however, were not repeated at the time petitioner appeared before the Subcommittee on January 5. But petitioner, having failed to raise the issue of pertinency when he appeared before the Subcommittee, cannot raise it for the first time at his trial for contempt.

Petitioner's lengthy statement of legal argument and authorities (Gov. Ex. 3; J.A. 25–34), which was obviously prepared by or at least with the help of his counsel, justifies petitioner's refusal to answer entirely on the basis of various constitutional grounds (see the Statement, *supra*, p. 6). The only suggestion of an objection to pertinency is the statement that petitioner "might wish to * * * challenge the pertinency of the question to the investigation"[7] (J.A. 33). Considering the same statement in a substantially similar legal memorandum,[8] this Court in *Barenblatt*, 360 U.S. at 124, held that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, * * * buried * * * in the

[7] This statement demonstrates that petitioner knew how to object to the pertinency of the questions if he was actually in doubt and wished to base his objections on this ground.

[8] See page 234 of Record in *Barenblatt*, No. 35, Oct. Term, 1958.

context of [the witness'] general challenge to the power of the Subcommittee." Therefore, here, as in *Barenblatt*, the witness failed "to trigger what would have been the Subcommittee's reciprocal obligation" to explain the pertinency of the question. *Ibid.*

5. Petitioner contends (Pet. 3, 13) that the indictment was invalid because it failed (a) to specify the subject under inquiry or the pertinency of the questions and (b) did not allege that petitioner's refusal to answer was wilful.

a. The indictment stated simply in the words of the statute, that the defendant unlawfully refused to answer "questions which were pertinent to the question then under inquiry" (J.A. 1). As we have shown in our Brief in Opposition (pp. 8–10) in *Russell* v. *United States*, No. 239, this Term, pending on petition for a writ of certiorari, this form of indictment—simply charging the defendant in the statutory language—is supported by substantial judicial authority. Moreover, petitioner was not compelled by the general allegation to guess as to the subject under inquiry or the pertinency of the questions. If petitioner was in any doubt as to the subject under inquiry or the pertinency of the questions, he could have easily moved for a bill of particulars.

b. Petitioner's contention concerning the failure of the indictment to allege wilfulness is answered by our Brief in Opposition (pp. 18–19) in *Liveright* v. *United States*, No. 328.

6. Petitioner further contends (Pet. 3, 13) that he was entitled to a hearing into the bias of Federal Government employees on the grand jury on the basis of

allegations that these jurors are biased as a result of the government security program. But as we have shown in our Brief in Opposition (pp. 5–8) in *Russell* v. *United States*, No. 239, this Term, a defendant is not entitled to a hearing to show bias on the part of grand jurors unless, at the least, his motion and accompanying affidavit allege specific, individual, and strong bias in particular grand jurors—allegations which he would ultimately have to prove to have the indictment dismissed. Petitioner, however, has alleged only opinions that there exists among government employees *in general* fear of loss of employment as security risks as to make it likely that any individual government employee would be afraid to vote against the return of an indictment in any case connected with Communism.

7. Petitioner attacks (Pet. 9–11) the trial court's order quashing subpoenas directed at the Subcommittee's files and sustaining objections to his cross-examination of the Subcommittee's counsel as to the identity of a confidential informant and information in the Subcommittee's files (J.A. 10, 48–49, 83, 93–95, 98, 99–100). Petitioner reasons that these actions prevented him from showing that the Subcommittee did not have probable cause to call him before it (see *supra*, pp. 13–14).

This same contention is answered in our Brief in Opposition (pp. 20–21) in *Liveright* v. *United States*, No. 328. As in that case, the Subcommittee's counsel testified at length on both direct and cross-examination concerning the information possessed by the Subcommittee as to petitioner's participation in Communist or Communist-supported activities and close association with Party members (J.A. 51–55, 65, 96–102) and refused to disclose only the files of the Subcommittee and highly confidential information (J.A. 48–49, 83, 93–95, 98, 99–100).*

---

* Petitioner suggests (Pet. 13) that certiorari should be granted because several of the issues raised by his petition are now before the Court in *Wilkinson* v. *United States*, No. 37, this Term, certiorari granted, 362 U.S. 926, and *Braden* v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 960. Although several of the issues are in fact common to this case and the two pending cases, we submit that the earlier cases do not provide any basis for asking this Court to grant this writ or even to withhold action.

One of the issues raised by petitioner—whether the indictment must specify the subject under inquiry—is also involved in *Braden*. But while we cannot, of course, be certain of the reasons why the Court granted certiorari in that case, we believe that this issue is without substance, being controlled by clear judicial precedent, and is distinctly subsidiary to the more serious issues involved in *Braden*. While the two pending cases raise the pertinency of the questions to the subject under inquiry (which is closely related to the issue in this case whether the witness was apprised of the subject under inquiry) and alleged violations of the witness' First Amendment rights, determination of these issues, in view of this Court's holding in *Barenblatt* (see 360 U.S. at 123–124, 127–134), depends on the particular facts of each case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 12

WILLIAM A. PRICE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 12

WILLIAM A. PRICE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 138-142) is reported at 280 F. 2d 715. The District Court wrote no opinion.

Jurisdiction

The judgment of the Court of Appeals (R. 143) was entered on June 18, 1960 (R. 143). The petition for a writ of certiorari was timely filed on August 17, 1960, and

granted on June 19, 1961. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Questions Presented

Petitioner, a New York Daily News reporter, was convicted of contempt under 2 U.S.C. 192, fined, and sentenced to three months imprisonment for refusing to answer certain questions at a hearing of the Internal Security Subcommittee of the Senate Judiciary Committee.[1] The questions presented are:

1. Whether the indictment of petitioner under 2 U.S.C. 192 was invalid in view of its failure to state (a) the subject under inquiry[2] by the Subcommittee at the time of the alleged contempts, (b) the pertinency to that subject of the indictment questions and (c) the willfulness of petitioner's failure to answer the questions.

2. Whether the Government sustained its burden at the trial of showing the subject under inquiry when petitioner failed to answer the indictment questions and the pertinency to that subject of those questions; and whether, at the Subcommittee hearing, petitioner was adequately apprised thereof.

---

[1] The Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary of the United States Senate, herein designated "the Subcommittee" or "the Internal Security Subcommittee".

[2] To distinguish the "question under inquiry", as that term is used in 2 U.S.C. 192, from the actual questions put to petitioner as to which contempts were charged (hereinafter sometimes "the indictment questions"), we use the term "subject under inquiry" or "subject of inquiry" in lieu of the statutory term "question under inquiry".

3. Whether the Government sustained its burden of showing probable cause for summoning petitioner as a witness before the Subcommittee and for subordinating his right of privacy to the public interest involved, if any.

4. Whether petitioner at the trial was denied the rights to a full and fair defense and of cross-examination, guaranteed to defendants in all criminal cases.

5. Whether Senate Resolution 366, 81st Cong., 2nd Sess., the charter of authority of the Subcommittee, is so vague as to invalidate the Subcommittee's power to compel testimony in the First Amendment area.

6. Whether an investigation into the "Communist Party strategy of placing its disciples in key positions in the fields of communications, newsgathering and reporting, education and other areas in which public opinion could be influenced" violated the freedoms guaranteed by the First Amendment.

7. Whether the Subcommittee, when it sat in this case, was a competent committee of the Senate within the purview of 2 U.S.C. 192.

8. Whether in this case, involving questions relating to Communist Party membership and affiliation, petitioner was improperly denied the right to show the bias of Federal Government employee jurors and, on such a showing, to have the indictment, returned by a grand jury composed in the majority of such Federal Government employees, dismissed.

Constitutional Provision, Statute and Resolution Involved

The following provisions of the Constitution are involved: Article I, sections 1 and 9, clause 3; Article III, section 1; and the First, Fifth, Sixth, Ninth and Tenth Amendments.

The following statutes are involved: 2 U.S.C. 192, as amended (R.S. Sec. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) and 2 U.S.C. 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753, Title I, Sec. 133, 134(c), 60 Stat. 831 *seq.*). Senate Resolution 366, 81st Cong., 2d Sess., is also involved. These statutes and the Resolution are set forth in the Appendix, *infra*, pp. 46-48, *seq.*

Statement of the Case

Petitioner, a newspaper reporter employed by the New York Daily News, was convicted for contempt under 2 U.S.C. 192, for refusal to answer eight questions at a hearing of the Subcommittee held on January 5, 1956, in Washington, D.C. (R. 1-2). The hearing was one in a series titled "Strategy and Tactics of World Communism," scheduled purportedly because of testimony previously received by the Subcommittee, in June, 1955, from Winston M. Burdett, a radio commentator. Burdett had testified that in the late 1930's and early 1940's, while employed on the Brooklyn Eagle, he had become a member of the Communist Party, and he had named a number of persons as fellow-members.[3] Petitioner, however, was not one of the persons so named (R. 55).

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[3] See Hearings before Senate Internal Security Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 1st sess., Parts 14, 15 and 16.

In December, 1955, petitioner was summoned and questioned before an executive session of the Subcommittee in New York City (R. 55). He was then recalled to a public session of the Subcommittee, in Washington, D.C., on January 5, 1956, where he refused to answer eight of numerous questions put to him (R. 16-47).

Only three of the eight questions on their face related to inquiries into Communist activities (R. 1-2). The Count 1 question inquired whether petitioner was at the time of the hearing a member of the Communist Party; the Count 8 question, whether he had ever been a member; and the Count 2 question, whether he had ever attended "Communist meetings". The Count 3 question inquired whether petitioner then knew one "Marcella Hitschmannova", and the succeeding questions whether he had flown "a considerable mileage in Central America and Latin America"; whether he had flown "a privately owned airplane as distinguished from a military or naval airplane . . . as a private citizen . . . in Latin and South America . . . [with] another person with you for a good part of the time"; who had been "the person who accompanied you on that lengthy flight in Latin and Central America"; and when it had been that he had "made this lengthy trip to Latin and Central America" (R. 2).

The transcript of the Subcommittee hearing appears at R. 16-47. Shortly after the hearing began, when petitioner was asked whether he had been "a candidate for vice-president on the rank-and-file slate of the New York Newspaper Guild in 1949", he inquired "why this question is put" (R. 18). To which, J. G. Sourwine, the Subcommittee's chief counsel, replied, as follows (*ibid.*):

> "The question is put to qualify you as a person of whom we can ask questions with respect to the persons

who were on that slate and the manner in which that slate was supported."

Although petitioner thereafter repeatedly protested that the Subcommittee had no jurisdiction or power to question him as to his personal affairs and political beliefs and opinions, and insisted that no legislative purpose could be served by the questions put to him (see R. 19, 22, 23, 24-34, 35, 36, 38, 42), Subcommittee counsel Sourwine's reply quoted above was the only statement which even remotely indicated what the Subcommittee's inquiry was about.[4]

Petitioner was indicted for contempt on November 26, 1956.[5] Thereupon he moved to dismiss the indictment on

---

[4] Sourwine's reply, of course, falls far short of that precise statement of subject under inquiry which *Watkins* v. *United States*, 354 U.S. 178, and other decisions of this Court require to sustain a conviction under 2 U.S.C. 192. Nor is there any proof that Subcommittee's counsel had the authority to define the subject under inquiry by the Subcommittee. In any event, none of the indictment questions is pertinent to the composition of the Newspaper Guild rank-and-file slate or the manner in which it was supported.

Other statements had been made by Senators Eastland and Hennings on January 4, 1956, the day before petitioner appeared. Hearings before the Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 2d sess., Part 17, pp. 1587, 1588. There was no showing, however, that petitioner had heard these statements or been apprised of them prior to his appearance (R. 57). And, as we hereafter demonstrate (Argument II, *infra*, pp. 20), these statements were so general and vague that they likewise failed to satisfy the requirements of *Watkins*.

[5] Eighteen witnesses were called in a series of Subcommittee Hearings held on January 4, 5 and 6, 1956. Their testimony appears in Hearings before the Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 2d sess., Part 17. Petitioners Shelton (No. 9) and Whitman (No. 10), as well as the present petitioner, were called as witnesses. Another witness called, Seymour Peck, also indicted for contempt, was acquitted by Judge Youngdahl, after trial in 1957, on the ground that the Subcommittee's inquiry was not sufficiently precise within the *Watkins* rule. See *United States* v. *Peck*, 154 F. Supp. 603 (D.D.C.).

the grounds, *inter alia*, (a) that the indictment was invalid for failure to allege the subject under inquiry by the Subcommittee at the time of the alleged contempts and the pertinency to that subject of the questions put to petitioner, and (b) that the indictment was void in that more than twelve members of the indicting grand jury were Federal Government employees and, because of the fear engendered by the Government's loyalty and security programs, actually prejudiced and biased against petitioner (R. 4-8). An affidavit of petitioner's counsel was filed in support of the charge of bias. Petitioner requested that if the indictment were not dismissed on that ground, a preliminary hearing should be held at which he might "offer proof, by examination of grand jurors and otherwise, that bias or prejudice existed on the part of more than twelve members of the grand jury who concurred in the indictment" (R. 7). The trial court denied the motion to dismiss and the alternative request for a hearing to examine into the bias of the grand jury (R. 8).

Prior to the trial, subpoenas were issued to the Subcommittee's chief counsel and to the Senate Clerk directing that they produce, among other things, all Subcommittee records relating to petitioner and minute books covering the series of investigations and hearings in the course of which petitioner had been summoned (R. 8-10). On the Government's motion, the trial court quashed these subpoenas (R. 48-49).

The case was tried by the court without a jury. The Government's chief and only material witness was Sourwine. He testified that although the Subcommittee "had no information directly placing . . . (petitioner) in the Communist Party" (R. 55), other information allegedly in the Subcommittee's files had caused it to summon petitioner (R. 51-55, 65). A substantial part of this information, Sour-

wine said, had come from a "confidential informant" (R. 52, 83, 93, 94).

Although the trial court permitted Sourwine thus to testify freely as to this information, it barred cross-examination as to its source and denied petitioner's request that he be permitted to inspect the data insofar as it was in writing (R. 82-83, 93, 94-95, 97, 99-100, 100-103). In view of these limitations on cross-examination, petitioner moved that Sourwine's testimony be stricken (R. 82-83, 113). The trial court, however, denied the motion to strike (R. 84, 113).

Sourwine's testimony as to the subject of the Subcommittee's inquiry was scant and in the most general of terms. He stated variously that the Subcommittee was seeking information in "several allied fields, all having to do with the activities of the Communist Party and its strategy and tactics" (R. 54); that the subject of the inquiry was "Strategy and Tactics of World Communism" (R. 62); and that the Subcommittee was interested in "the Communist conspiracy to overthrow the Government of the United States by force and violence" (R. 84-85).

This general testimony was consistent with the Government's view, that the subject of the inquiry here was coextensive with and no more specific than the scope of the total jurisdiction of the Subcommittee expressed in Senate Resolution 366 (R. 130-133, *passim*).

Petitioner's motion for a judgment of acquittal at the close of the Government's case was denied (R. 129-134).

Opening his case, petitioner vainly renewed his request for enforcement of the subpoenas previously issued (R. 134). Petitioner then made a proffer of proof, stating that the subpoenaed materials, if disclosed, would prove, *inter alia*, that the real purposes of the Subcommittee's inquiry

were to control and fix the standards of employment of newspaper reporters and to influence the character and content of newspaper reporting; that the Subcommittee also desired in its investigation of petitioner to harass him and to expose him to the contempt of the public and his associates; and that it was not acting with the least possible power in pursuance of any legislative function (R. 135-136).

At the conclusion of the trial, the court found that the Subcommittee was duly constituted and inquiring into matters within its authority and for legitimate legislative purposes, that the indictment questions were pertinent to the matter under inquiry, that petitioner had refused to answer them, and that petitioner had been properly informed by the subpoena of the purpose and reason for his summoning by the Subcommittee (R. 136-137). The trial court, however, did not specify the nature of the subject under inquiry by the Subcommittee. On these findings, the court held petitioner guilty on all counts of the indictment and, on April 12, 1957, entered its judgment and imposed a sentence of $500 fine and three months in prison (R. 137, 11).

Notice of appeal to the Court of Appeals was filed on April 12, 1957 (R. 12). On June 18, 1960, the Court of Appeals affirmed the conviction (R. 143). The opinion of the Court in this case is singular in that, in contrast to its opinions announced on the same day in companion cases of contempt, it was completely silent as to the subject under inquiry to which the indictment questions here were pertinent.

Summary of Argument

I

The indictment charged that petitioner had "unlawfully refused" to answer questions "pertinent to the question then under inquiry" before the Subcommittee. It did not state the subject of the inquiry which the Subcommittee was conducting, its authority to conduct that particular inquiry, the respects in which the questions set forth in the indictment were pertinent to the subject of inquiry and the fact that petitioner's refusal to answer was wilful.

The indictment is, therefore, insufficient in that it is couched in generic terms and likewise it fails to state the following essential elements of an offense under 2 U.S.C. 192: subject matter of the inquiry, Subcommittee authorization to conduct that inquiry, pertinency of the indictment questions to that subject matter, and the wilfulness of the refusal to answer the said questions. A statement of these elements was necessary in order to aid petitioner in addressing himself by motion to the sufficiency of the indictment and in order that he might adequately defend himself at the trial. The failure to draft a proper indictment deprived the defendant of his right under the Sixth Amendment "to be informed of the nature and cause of the accusation".

II

This Court has twice recently indicated the necessity that before a witness is subpoenaed a committee must have "probable cause or belief that he possessed [helpful] information" *Barenblatt* v. *United States*, 360 U.S. 109, 134, and *Wilkinson* v. *United States*, 365 U.S. 399, 412. No such

probable cause has been shown in the instant case. Indeed, the reasons for calling petitioner were a compound of irrelevancy, mistaken identity and interference with the right of petition.

III

The Government failed to show at the trial either the subject of the Subcommittee's inquiry or the pertinency of the indictment questions. In the course of the Subcommittee hearing, its counsel made only one statement concerning the subject under inquiry—that he was investigating a slate of officers in a Newspaper Guild election. At the trial, the Subcommittee counsel offered three subjects of inquiry: (a) Communist Party tactics and strategy, (b) "Strategy and Tactics of World Communism", and (c) "anything which affects or threatens the internal security of the United States" (R. 54, 61-62, 84). These varied statements certainly do not establish the subject under inquiry by the Subcommittee with sufficient preciseness to guide the Court in determining that matter as well as pertinency.

This absence of proof at the trial is distinct from the Subcommittee's failure to make subject matter and pertinency luminous to the witness at the time of the Subcommittee hearing. No elaborate explanation at the trial could make up this deficiency.

IV

Luminosity as to subject matter and pertinency at the time of the Subcommittee hearing is a condition to a conviction under 2 U.S.C. if a witness has challenged the Subcommittee's right to inquire. *Watkins* v. *United States*, 354 U.S. 178, 216-217. Such a challenge was made by the petitioner, courteously but firmly. Yet the Subcommittee ***admittedly*** (R. 113) did not respond with the requisite in-

formation. Therefore, since it cannot be said that "the subject matter has been made to appear with indisputable clarity" (354 U.S. at 214), petitioner was "not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment" 354 U.S. at 215.

V

The Government was required to establish the reasons which in its view constituted probable cause for the issuance of a subpoena to petitioner. It made such an attempt at the trial by testimony that the Subcommittee had received certain information concerning petitioner's activities and associations. Plainly, petitioner was entitled to test the veracity of the Government's witness and to determine whether or not such information existed and whether or not there was probable cause for subpoenaing petitioner. Nevertheless, the trial court quashed a subpoena issued to Subcommittee counsel directing the production of such information, rejected petitioner's request for an opportunity to examine it and barred reasonable cross-examination on these matters covered by the direct examination and clearly relevant to the issues of the case. This curtailment, an obstruction of petitioner's rights to engage in reasonable cross-examination and to make a full defense, violated his fundamental rights of a defendant in a criminal prosecution.

VI

Senate Resolution 366, the Subcommittee's charter, has not previously been passed upon by this Court. An examination of it will show that it is so vague as not to furnish a valid basis for a criminal prosecution. The Resolu-

tion does not come with the gloss of legislative history; this is the first known investigation of the press. The Resolution is even vaguer than that involved in the *Watkins* case since it comprehends "subversive activities" which are not limited to "movements seeking to overthrow the Government of the United States by force and violence." Since First Amendment rights are clearly involved, the defect of vagueness is compounded.

VII

The Subcommittee was admittedly engaged in an investigation of the press. (1) This appears from the record of the companion cases now before the Court as well as from the record herein. The first question addressed to petitioner related to his candidacy in a newspapermen's union (R. 15), a question significantly omitted from the indictment. (2) The Subcommittee claimed to be investigating "Strategy and Tactics of World Communism" (R. 62-64, 64-65), a term of considerable breadth and vagueness of contour. (3) The Section of Senate Resolution 366 under which it was proceeding related to "Subversive Activities", a term of equal breadth and obvious infringement upon First Amendment rights since it is *"not limited"* to criminal activities or to movements seeking the violent overthrow of the Government.

It is also significant that petitioner was apparently subpoenaed under the erroneous impression that he had signed a petition to the President of the United States on the subject of Smith Act prosecutions; that petitioner was asked concerning his background as a newspaperman; that his sworn denial as to ever having engaged in criminal activities (R. 44) was disregarded by the Subcommittee. All this confirms the view that the inquiry directed against him violated his rights under the First Amendment.

VIII

Petitioner could not lawfully be convicted of contempt under 2 U.S.C. 192 unless the Subcommittee was authorized to sit at the time of his hearing. *Christoffel* v. *United States*, 338 U.S. 84. The Legislative Reorganization Act of 1946, Sec. 134(c), prohibits committee meetings while the Senate is sitting, absent special leave. In the instant case, the Subcommittee sat without such special leave. It follows that it was not a tribunal competent to act as a Senate committee and particularly to compel a citizen to testify.

IX

Petitioner was indicted in 1956 by a grand jury in the District of Columbia, a majority of whose members were federal government employees. He made a preliminary motion to dismiss the motion upon an affidavit affirmatively showing actual bias and prejudice on the part of such jurors as a result of fear induced by the federal loyalty and security program. Alternatively, he moved for a hearing for the purpose of offering testimony to show such bias.

The denial of these motions violated petitioner's right to an impartial grand jury. This Court has not previously passed upon the validity of an indictment in a case of this type, claimed by the government to involve national security, where the government employees on the jury had been subject for more than a decade to the impact of the loyalty and security program. A realistic appraisal of the current scene in Washington requires recognition of the fact that the grand jury was subject to bias. In any event, there is no possible justification for not giving petitioner an opportunity to prove such bias. See *Dennis* v. *United States*, 339 U.S. 162.

ARGUMENT

I

The Indictment Was Insufficient Because It Failed to Set Forth Essential Elements of the Crime: Subject Matter of Inquiry, Pertinency, Wilfulness and Subcommittee Authority.

The indictment here alleged only that petitioner, as a witness before the Subcommittee, was asked questions "which were pertinent to the questions then under inquiry" and that he "unlawfully refused to answer those pertinent questions" (R. 1).

The indictment was therefore insufficient from two points of view: first, because it merely stated the offense in the generic term of the statute; second and more specifically, because it failed to set forth essential elements of the crime: the subject of the inquiry, the respect in which the questions were pertinent, that the refusal to answer was a wilful one and that the Subcommittee had authority to take testimony.

The first principle is set forth in the classic case of *United States* v. *Cruikshank*, 92 U.S. 542, 558, which holds that "it is not sufficient that the indictment shall charge the offense in the same generic term as in the definition; but it must state the species, it must descend to particulars". In that case, as well as in *United States* v. *Simmons*, 96 U.S. 360; *United States* v. *Hess*, 124 U.S. 483, this Court dismissed indictments for such defects, on the ground of the Sixth Amendment right of the defendants "to be informed of the nature and cause of the accusation".

For the sake of brevity and convenience, petitioner respectfully refers this Court to the able argument on this

point in petitioner's brief in *Russell* v. *United States*, No. 8, this Term.

Secondly, the indictment fails to state essential elements of the crime of contempt. 2 U.S.C. 192 makes it a crime for a person subpoenaed to give testimony "upon any matter under inquiry before . . . any committee of either House of Congress" to refuse to answer questions only as are "pertinent to the question under inquiry." In addition, it must appear that "such material or answers fall within the grant of authority actually made by Congress to the investigating committee." *United States* v. *Orman*, 207 F. 2d 148 at 153; *Bowers* v. *United States*, 202 F. 2d 447; *United States* v. *Rumely*, 197 F. 2d 166, 177, aff'd 345 U.S. 41. See, also, *McGrain* v. *Daugherty*, 273 U.S. 135; *Kilbourn* v. *Thompson*, 103 U.S. 168; *Quinn* v. *United States*, 349 U.S. 155.

Both (a) the subject of inquiry and (b) the committee's jurisdiction must be pleaded by the Government, since "[a]n indictment is required to set forth the elements of the offense sought to be charged." *United States* v. *Debrow*, 346 U.S. 374, 376; *United States* v. *Lattimore*, 215 F. 2d 847, 848, aff'd in part, 112 F. Supp. 507.

The proper way to state the subject of inquiry is to do just that: to state in the indictment what it was that the particular committee was investigating. This is the procedure which was followed by the grand jury which indicted Dr. Owen Lattimore. See *United States* v. *Lattimore*, 215 F. 2d 847 and 112 F. Supp. 507 (in which the indictment is fully set forth). It was the procedure also followed in *Sinclair* v. *United States*, 279 U.S. 263, 270.

There are two practical reasons why indictments for contempt of Congress must state in specific terms the subject under investigation. The first is a reason common to every indictment:

> " . . . The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances." *United States* v. *Cruikshank*, 92 U.S. 542, 558.

Secondly, and specifically with respect to contempt cases, the indictment must state the nature of the inquiry (which is a fact) in contradistinction to the allegation that it was within the committee's jurisdiction (which is a conclusion of law to be drawn by the court). How can a court decide a motion to dismiss the indictment on the ground that the inquiry was not within the committee's jurisdiction if it does not know the nature of the inquiry? How can it decide that the unanswered question is pertinent to a subject not disclosed to it?

In a well considered opinion, District Judge Bicks, in discussing the analogous problem in perjury cases involving materiality, said:

> ". . . it 'is undoubtedly necessary that it should appear on the face of the indictment that the false allegations were material in the matter in issue . . . [T]he facts set forth as falsely . . . sworn to should be sufficient in themselves to show such materiality.' *Markham* v. *United States*, 160 U.S. 319, 325. Such facts may 'not

be left to surmise or to be reached by way of inference or argument.' *Danaher* v. *United States*, 39 F. 2d 325, 327." *United States* v. *Laut*, 17 F.D.R. 31, 35 (S.D.N.Y.).

There are no countervailing considerations. Nothing is simpler than for the draftsman of an indictment to state what it was the committee was investigating. He must know it if he is to present any evidence—competent or hearsay—to the grand jury. The grand jury must know it, since the Fifth Amendment's guaranty against prosecution without indictment would be rendered meaningless. *Costello* v. *United States*, 350 U.S. 359, permitting indictments upon hearsay evidence, makes it all the more necessary for a defendant to be faced with a specific statement in the indictment of the facts constituting the offense.

The indictment in the present case, however, contains no specification of the subject under inquiry and sets forth no facts which would permit the courts to determine upon a motion to dismiss for insufficiency, what the subject was and whether the questions put to petitioner were pertinent to that subject. In a case determined by this Court, which involved this Subcommittee, it is significant that there was such diversity in the subject of the Subcommittee's inquiry as proved at the trial, this Court was unable to make a determination as to pertinency. *Sacher* v. *United States*, 356 U.S. 576.

Also fatal to the indictment here is its failure to state if that was a fact, that the principal Committee had authorized the Subcommittee to conduct the inquiry here involved. Senate Resolution 366 is a grant of authority to "the [Senate] Committee of the Judiciary or any duly authorized subcommittee thereof" (*infra*, p. 47). The indictment refers to the Resolution, but it nowhere alleges that there was

any authority vested in the Subcommittee here involved, nor does it set forth the basis for the Subcommittee's action in this case.

The reasons why this element, that of Subcommittee jurisdiction, must also be set forth with specificity in an indictment are spelled out in *United States* v. *Lamont,* 18 F.R.D. 27, where Judge Weinfeld dismissed an indictment in what the Court of Appeals described as a "scholarly opinion" (236 F. 2d 312). There, reviewing the historical function of the grand jury, Judge Weinfeld pointed out that an indictment stating all of the elements of a crime, including authority of the particular subcommittee, was necessary for two reasons: first, so that the defendant might be able to secure dismissal of an indictment which did not allege a crime and, second, so that the defendant might adequately defend himself at the trial.

The Court of Appeals, in an opinion by Chief Judge Clark, essentially agreed with Judge Weinfeld's reasoning and emphasized the fact that the issue was not merely procedural but went "to the very substance of whether or not any crime has been shown." The Court was particularly concerned that the indictment related to matters of a First Amendment character, citing, in particular *United States* v. *Rumely,* 345 U.S. 41, 44.

The defects in the indictment here are fundamental and could not have been cured by a bill of particulars. See *United States* v. *Kamin,* 135 F. Supp. 382, 136 F. Supp. 791 (D. Mass.). Even this remedy of a bill of particulars is, however, generally not available in the District Court of the District of Columbia, under the settled decisions there. *United States* v. *Flaxer* (C-1756-52), conviction reversed 358 U.S. 147; *United States* v. *Nathan* (C-163-57); *United States* v. *Grossman* (C-515-53); *United States* v. *O'Connor* (C-1650-53), conviction reversed 240 F. 2d 404 (App.

D. C.); *United States* v. *Sacher* (C-1216-55), conviction reversed 356 U.S. 576.

Finally, the indictment fails to allege that the refusal of the witness was a wilful one. This Court, in *Quinn* v. *United States,* 349 U.S. 155, 165, note 33, held that "Section 192, like the ordinary federal criminal statute required a criminal intent—in this instance, a deliberate intentional refusal to answer. This element of the offense like any other must be proved beyond a reasonable doubt." In the *Lamont* case, *supra,* Judge Weinfeld, dismissing the indictment stated: "Since wilfulness, or a deliberate, intentional refusal to answer is an essential element of the offense which the government must prove, it must also be pleaded in the indictment." 18 F.R.D. 27. This was not pleaded in the indictment in the present case.

II

The Subcommittee Violated Petitioner's Rights Under the Fourth and Fifth Amendments by Compelling Him to Appear and Testify Before It Without Probable Cause of Grounds to Believe That He Had Information Pertinent to Its Inquiry.

The record does not establish that the Subcommittee had a reasonable basis for subpoenaing petitioner in this case. Such a basis is required under this Court's decision in *Barenblatt* v. *United States,* 360 U.S. 109, 134, where the Court said that the issuance of a subpoena to Barenblatt was proper because, in part, it did not involve "indiscriminate dragnet procedures, lacking in probable cause or belief that he possessed information which might be helpful to the Subcommittee". More recently, in *Wilkinson* v. *United States,* 365 U.S. 399, 412, the Court reiterated this position.

In the instant case, according to Subcommittee counsel Sourwine, the Subcommittee had been impelled to subpoena petitioner by the following information the Subcommittee had:

(1) Petitioner had been a candidate for Vice-President of the New York Newspaper Guild in 1949 on a ticket which Subcommittee counsel charged, without any evidence, was "Communist-supported" (R. 51).

(2) He had "been the recipient of numerous visits" from a young woman employed by United Nations and again characterized, without the slightest evidentiary support, as "A courier for the Communist Party" (R. 52).

(3) Finally, "he had in 1941 signed a statement in defense of the Communist party which had been printed in the Daily Worker" (R. 53).

On the other hand, "the committee had no information directly placing Mr. Price in the Communist party" (R. 55).

It is submitted that none of the reasons advanced by the Government furnished a rational basis for the issuance of a subpoena to a private citizen. Open participation in the electoral processes of a union is no such justification. Association with a young woman, which is not shown by an iota of evidence to have been in the least improper, is equally no justification.

Most significant is the Subcommittee's interest in the so-called petition "in defense of" the Communist party. This Subcommittee, as well as the House Committee on Un-American Activities, as the records of both will show, have repeatedly regarded signature on such a petition as basis for examination of a citizen. In the instant case, attribution to petitioner of the signature on the particular petition appears to have been a case of mistaken identity,

since petitioner was not the William Price of Scottman, Pa. who apparently did sign (R. 104-105). This would appear then to be a case of mistaken identity not very different from that involved in *Shelton* v. *United States*, No. 9, this Term. But there is a more fundamental objection to sanctioning the issue of a subpoena by a Congressional Committee because one has signed a public statement of the kind involved. The petition involved turns out to be a sober and thoughtful request to the President of the United States not to continue the prosecution under the Smith Act. The signatories included such distinguished names as Professors Zechariah Chafee, Jr., W. Ernest Hocking, Max Lerner and Franz Boas (R. 105). To permit the Subcommittee to subpoena witnesses on the basis of signature to such a petition is not only a violation of the Fourth and Fifth Amendments, but of the First Amendment.

In the interest of brevity, we do not repeat, but adopt in full, the scholarly discussion of this point in Argument I of the brief for petitioner in *Shelton* v. *United States*, No. 9, this Term.

III

The Government at the Trial Failed to Show the Subject of the Subcommittee's Inquiry and to Establish the Pertinency of the Indictment Questions.

In a prosecution under 2 U.S.C. 192, the Government has the "duty at the trial to prove that the questions propounded by the congressional committee were in fact 'pertinent to the question under inquiry' by the committee", and the "first step in proving that component of the offense . . . [is] to show the subject of the subcommittee's inquiry" at the time the indictment questions were put to the witness. *Deutch* v. *United States*, 367 U.S. 456 (prelim. print), 81 S. Ct. 1587. Precise delineation of the subject under inquiry is essential not only to assure due process to the defendant

but also to enable to courts in a prosecution under 2 U.S.C. 192, to determine whether the indictment questions were in fact "pertinent to the question under inquiry" and a conviction in the particular case is justified. As Mr. Justice Frankfurter stated, concurring in *Watkins* v. *United States*, *supra*, 354 U.S. at 217:

> ". . . the scope of inquiry that a committee is authorized to pursue must be defined with sufficiently unambiguous clarity to safeguard a witness from the hazards of vagueness in the enforcement of the criminal processes against which the Due Process clause protects. The questions must be put with relevance and definiteness sufficient to enable the witness to know whether his refusal to answer may lead to conviction for criminal contempt and to enable both the trial and the appellate courts readily to determine whether the particular circumstances justified a finding of guilty."

The Government failed to make the necessary showing in this case.

The trial record in this case on the issue of pertinency consists of the transcript of the Subcommittee hearing and the testimony of Sourwine. Neither the transcript nor Sourwine's testimony supplies a satisfactory particularization of subject under inquiry. On the contrary, both exhibit such an utter disregard of the need for precision and such hopeless confusion as makes it impossible to adduce the subject of the Subcommittee's inquiry at the time, if indeed there was any.

As we have indicated (*supra*, p. 21), when, early in the hearing, petitioner was asked whether, in 1949, some seven years prior thereto, he had been a candidate on the rank-and-file slate of the National Newspaper Guild, he inquired "of the Subcommittee as to why this question is put" (R.

118). To which, Sourwine answered: "The question is put to qualify you as a person of whom we can ask questions with respect to the persons who were on that slate and the manner in which that slate was supported" (*Ibid.*). *This was the only statement made during the entire hearing relating to the subject under inquiry by the Subcommittee.*[6]

Sourwine's testimony at the trial is not only useless in delineating a subject of inquiry; it throws the issue into hopeless obscurity. In response to questions by the Government prosecutor and petitioner's counsel, Sourwine variously testified that the subject under inquiry at the time of petitioner's appearance was, as follows:

(a) "... The committee was seeking information in several allied fields, all having to do with the activities of the Communist Party and its strategy and tactics" (R. 54).

(b) The subject of inquiry was "Strategy and Tactics of World Communism" (R. 61-62).

(c) "The Internal Security Subcommittee ... is interested under its delegation of authority and imposition of duties from the Senate, in anything which affects or threatens the internal security of the United States. Certainly, the Communist conspiracy to overthrow the Government of the United States by force and violence is a major part of that inquiry" (R. 84-85).

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[6] Beyond the fact that this statement hardly constituted that precise definition of subject under inquiry necessary to a conviction under 2 U.S.C. 192, it was made not by the Subcommittee, but rather by Subcommittee counsel. There is no proof that the statement, inadequate as it was, was authorized by the Subcommittee or to have reflected a Subcommittee decision. Nor is there any suggestion that counsel had any authority to determine the nature of Subcommittee's investigations. In any event, none of the indictment questions were in any way pertinent to the composition of or support for the Newspaper Guild slate.

Reference was also made at the trial to the statements which Senator Eastland and Senator Hennings made at the commencement of the hearing on January 4, 1956, the day before petitioner appeared. As already noted, there was no showing that petitioner heard these statements or was apprised of them prior to his appearance (R. 57). The Government prosecutor thought petitioner was not in the hearing room at the time they were made; and Sourwine did not know (*Ibid.*). The statements, in any event, do not advance our search; for they obscure rather than clarify.

In his statement on January 4, 1956, Senator Eastland referred to the Burdett testimony, to which we have already adverted (*supra*, p. 4), and announced that the Subcommittee "was in duty bound to pursue every lead which developed out of the Burdett testimony". Hearings before the Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 2d sess., Part 17, p. 1587. Senator Hennings, on the other hand, stated that the Subcommittee was "interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency". *Id.* at 1588; R. 59.

Hardly had these statements been made, however, when Subcommittee counsel Sourwine expressly disclaimed that "Communist infiltration into the field of communications" was the subject of the hearings.[7] Later in the same day, Sourwine defined the subject under inquiry in the same broad terms as those on which the Government insisted during the trial of this case: "The subject matter of the

[7] The first witness called on January 4, 1956, James S. Glaser, noted the New York Times had reported that the "announced reason for this hearing was an intent to investigate Communist infiltration of the press and other forms of communication"; whereupon Sourwine declared: "For your information, the committee has made no such announcement. It is not accurate." (Hearings, *supra* at 1616).

committee's inquiry is Communist activity and the committee is proceeding on the basis of previous testimony and information furnished to it with respect to Communist activity" (*Id.* at 1652).

This is the sum of the statements made prior to and at the hearing which relate to the subject of inquiry. At the trial, both the Government prosecutor and the Subcommittee counsel Sourwine conceded that these statements do not furnish a definition of subject under inquiry within whose frame the issue of pertinency can be resolved.

Mr. Hitz, the prosecutor, firmly took the position that the inquiry in which the Subcommittee was here engaged was coextensive with and no more specific than the broad powers enunciated in its enabling resolution, Senate Resolution 366 (R. 130-133, *passim*). It was his view that the purpose of the Subcommittee's investigation in this case, as in all cases, was "to locate Communists wherever found" to "route out Communists and locate them wherever they are" (R. 133). He suggested no other or more precise formulation for the subject under inquiry nor did Sourwine.

The trial court apparently shared the Government's view and on that basis concluded that the Subcommittee was engaged in a legislative purpose and that the indictment questions were pertinent (R. 136). The Court of Appeals, affirming the conviction, did not trouble even to suggest what was the subject to which it found the indictment questions pertinent. In this respect, the opinion below in this case is markedly different from the opinion handed down by the Court on the same day in the common contempt cases; this is the only opinion in which the Court of Appeals fails to point to a particular subject under inquiry.

What we are unfavorably led to is the conclusion that the frame of reference on which the Government relied for

proof of pertinency in this case was Resolution 366 and that alone. Consequently, unless it affords a definition of subject under inquiry adequately precise to satisfy the requirements for conviction under 2 U.S.C. 192, the conviction of petitioner cannot stand.

Senate Resolution 366, however, offers no greater enlightenment as to the subject under inquiry by the Subcommittee in this case than did the Charter governing the House Committee on Un-American Activities in *Watkins, supra.* The futility of reliance on Resolution 366 for definition of the subject of inquiry in this case has been demonstrated in petitioner's brief filed by counsel here in *Liveright* v. *United States,* No. 11, this Term. We adopt and respectfully refer the Court to the argument in that brief (pp. 16-31).

Here again, the Subcommittee hearing involved and the trial of petitioner both antedated this Court's decisions in *Watkins* and *Barenblatt, supra.* Not having the guidance of the Court articulated in those decisions, neither the Subcommittee nor the trial court deemed it necessary that a specific subject of inquiry be established or shown to sustain conviction under 2 U.S.C. 192. The failure of the Court of Appeals to delineate such a particular subject in its opinion, rendered after *Watkins* and *Barenblatt,* can be explained only by the fact that the record in this case obviously permits no such delineation.

The Government having failed at the trial to show the subject under inquiry at the time the petitioner testified before the Subcommittee and the trial court having failed to find a particular subject under inquiry, the conviction of petitioner must be reversed.

IV

Neither the Subject Matter of the Inquiry Nor the Pertinency of the Questions Was Made "Luminous" to the Petitioner at the Time of the Subcommittee Hearing.

This Court has stated unanimously in *Watkins, supra,* that the subject matter and pertinency of the questions must be brought home to the witness with clarity at the time when he appears at the Subcommittee hearing. It is not enough that the Government should make up for an earlier default by clarifying these matters at the time of the criminal trial. *Cf. Deutch* v. *United States,* 367 U.S. 456. This is the requirement of the due process clause, as well as of the Sixth Amendment, requiring that a defendant "be informed of the nature and cause of the accusation".

The instant case is one in which the very admissions of the committee counsel at the trial are sufficient to establish absence of luminosity at the time of the subcommittee hearing. It will be noted first that this is not one of those hearings in which the committee began by reading a statement of purpose to the witness. Instead, it proceeded immediately to examine him (R. 16) and the very first question involved an association—trade union in this case—as follows:

> "Q. You were a candidate for Vice President on the rank and file slate on the New York Newspaper Guild in 1949?" (R. 18).

The petitioner stated:

> "I would like to make an inquiry of the committee as to why this question is put."

The committee's answer, through its counsel, was:

> "The question is put to qualify you as a person of whom we can ask questions with respect to the persons who are on that slate and the manner in which that slate was supported." (*Ibid.*)

This is a most significant answer because, aside from its essential ambiguity, it related to a non-indictment question and has nothing whatsoever to do with the questions set forth in the indictment (R. 1-2). The question that therefore arises is: Did the committee ever give any explanation to the petitioner when the indictment questions were put to him? The answer was given by Mr. Sourwine, subcommittee counsel at the trial:

> *"I don't think there was any other statement avowedly for that purpose."* (R. 113).

We submit that this is an unequivocal admission by the Government of the lack of luminosity at the time of the committee hearing.

It only remains to consider whether the Government is correct in its claim that it had no obligation to make subject matter and pertinency luminous because petitioner did not challenge it at the time of the committee hearing. As to this, the record is perfectly clear: Petitioner challenged in the most unequivocal terms the powers and jurisdiction of the committee (R. 19); he asserted his rights under the First Amendment (R. 19); he denied the existence of a legislative purpose (R. 23); and he incorporated all the prior grounds which he had stated in executive session (R. 22). The only defense which he surrendered was that of his constitutional privilege against self-incrimination under the Fifth Amendment. The Subcommittee was interested only in that surrender concerning which it had repeatedly inquired.

V

Petitioner Was Unduly Restricted in His Right of Cross-Examination at the Trial.

In prosecutions under 2 U.S.C. 192, "the court must accord to the defendants every right which is guaranteed to defendants in all other criminal cases". *Watkins* v. *United States*, 354 U.S. 178, 208; *Deutch* v. *United States, supra*, 81 S. Ct. at 1595. One of those rights, fundamental to a fair trial, is the right to submit the Government's witnesses to reasonable cross-examination. *Alford* v. *United States*, 282 U.S. 687; see *Reilly* v. *Pinkus*, 338 U.S. 269, 275-276. That right was denied petitioner on the trial of this case.

As we have indicated (*supra*, pp. 7, 8), Government witness Sourwine testified on direct examination that the Subcommittee had subpoenaed petitioner as a witness because it had received certain information concerning his activities and associations (R. 51-55).[8] This information, to whose existence he attested, was, according to Sourwine, both oral and written (see R. 93-95, 98, 99-100). When, however, petitioner sought to inspect the written material, the trial court barred him from doing so. And when petitioner endeavored to cross-examine as to the source of the information, the trial court firmly cut off all examination (*Ibid.*).

Before the trial, petitioner had secured the issuance of a subpoena directing the chief counsel of the Subcommittee to produce, *inter alia*, all written information in its files relating to petitioner (R. 8-10). On the Government's motion, the trial court quashed this subpoena (R. 48-49).

[8] As previously noted, however, Sourwine conceded that the Subcommittee "had no information directly placing . . . (petitioner) in the Communist Party" (R. 55).

Petitioner's request that Sourwine be directed to submit for petitioner's examination all "written memoranda, letters or other documents" of which he had testified was likewise denied (R. 83, 97).

Denied access to the Subcommittee's information, petitioner could not hope effectively to cross-examine the Government's witness. Nevertheless, he did try at least to ascertain the nature of the various items of information on which, as Sourwine testified, the Subcommittee had relied and the sources of such information (R. 83, 93-95, 98, 99-100). All to no avail. For, on the Government's repeated objections, the trial court consistently denied petitioner the right to engage in such cross-examination (*Ibid.*).

The testimony on which petitioner was thus denied opportunity to cross-examine was most material. This Court has made it clear that no person's appearance as a witness before a congressional committee, at least where his First Amendment rights are concerned, may "follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful" to the committee. *Barenblatt* v. *United States, supra,* 360 U.S. at 134. Proof of "probable cause" is relevant also to the judicial process of balancing the interest of the individual witness in his privacy and silence against the interest of the public in his testimony.

This is not a case such as *Barenblatt, supra,* where prior testimony had been received by the committee of the witness' participation in Communist Party activities, thus supplying probable cause for his interrogation. See 360 U.S. at 115. Not only had no such prior testimony been received as to petitioner here, but the Subcommittee had no information whatever "directly placing . . . [him] in the Communist Party" (R. 55). Only the information of which Sourwine testified at the trial could furnish basis for summoning petitioner.

No reason appears why Sourwine should have been accorded a higher status than that generally accorded Government witnesses in criminal prosecutions, why his testimony should have been deemed sacrosanct. Yet, the trial court would not permit petitioner to cross-examine to find out where the purported information had come from, whether Sourwine and his "informants" were credible witnesses, or, indeed, whether the information really did exist at all. So far as we know, it all may have been the product of a fertile imagination. The trial court, nevertheless, accepted it and required that petitioner be bound by it without question. Coupled with the quashing of the subpoena which had sought production of the Subcommittee's records, this meant a complete bar to any inquiry into the supposed basis for the subpoenaing of petitioner and the Subcommittee's urgent need to pry into his private affairs.

The Government's insistence that the information and its sources were confidential does not, of course, justify this drastic curtailment of cross-examination. In a criminal prosecution, the fundamental right of cross-examination surmounts the so-called informer's privilege of the Government. *Roviaro* v. *United States*, 353 U.S. 53; *Jencks* v. *United States*, 353 U.S. 657; *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2). As this Court said in *United States* v. *Reynolds*, 345 U.S. 1, 12, and reiterated in *Jencks, supra*, 353 U.S. at 671, "... since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense ...". And, as Judge Learned Hand said, in *Andolschek, supra*, 142 F. 2d at 506:

> "... the prosecution necessarily ends any confidential character the [Government] documents may pos-

> sess; it must be conducted in the open and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant . . .".

In *Barenblatt, supra,* the Court assumed the difficult function of balancing the "competing private and public interests at stake" in cases like the present one, recognizing how vital it was that a proper balance be struck lest a witness' constitutional liberties be unjustly invaded. The task is a delicate one, and the " 'subordinating interest of the State must be compelling' in order to overcome the individual constitutional rights at stake". 360 U.S. at 126-127.

If, however, the accused witness be thwarted, as was petitioner in this case, from inquiring into the truth or, indeed, the existence of the testimony offered in support of the "subordinating interest of the State" and from demonstrating (by showing that there was no cogent reason for compelling his attendance before the committee) that the committee inquiry was not in aid of any vital national interest, there can be no fair balancing of the conflicting "private and public interests at stake". If, as in this case, the First Amendment rights of the individual are to be subordinated merely on the *ipse dixit* of a Congressional committee's counsel, the individual's rights will inevitably yield to any committee's self-serving avowal of the legitimacy and *bona fides* of its investigation.

Petitioner was here denied the right to that effective cross-examination which is guaranteed the defendant in

every criminal case. Petitioner's conviction must consequently be reversed.

VI

The Enabling Resolution of the Subcommittee is Unconstitutionally Vague.

Senate Resolution 366 (*infra*, pp. 47, 48), which constitutes the charter on which the Subcommittee relied in this case, treated in conjunction with 2 U.S.C. 192, must be read as a criminal statute. *Sacher* v. *United States*, 356 U.S. 576, 577. To be valid, it must establish a standard of conduct that is not so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application". *Connally* v. *General Construction Company*, 269 U.S. 385 at 391. Vagueness is especially pernicious where, as here, First Amendment rights are involved. *Burstyn* v. *Wilson*, 343 U.S. 495.

In both *Watkins* and *Barenblatt, supra*, this Court had occasion to consider the issue of vagueness of the similar charter governing the House Committee on Un-American Activities. In *Watkins*, the Court said: "It would be difficult to imagine a less explicit authorizing resolution" 354 U.S. at 202. In *Barenblatt*, the Court, considering the charter in the context of an investigation of Communist infiltration in education, found it necessary to look to the legislative history of the charter in order to give it an ascertainable meaning. It referred to debates on the original authorizing resolution in the 75th Congress, to seventeen House reports from the 76th Congress to the 85th Congress, and to twenty-three House Resolutions over the same period. This legislative history, the Court held, impelled the conclusion that the Committee possessed "legislative authority to conduct the inquiry presently under consideration . . ." 360 U.S. at 122.

Unlike the situation in *Barenblatt*, this Court has never passed upon the validity of the Resolution here involved. In the only two cases involving this Subcommittee, the convictions were reversed. *Flaxer* v. *United States*, 358 U.S. 147; and *Sacher* v. *United States*, 356 U.S. 576, both decided on other grounds.

However, in *United States* v. *Peck*, 154 F. Supp. 603 (D.D.C.), Judge Youngdahl squarely decided that the very Resolution involved in this case was too vague to comport with due process. We adopt the reasoning in that case.

Senate Resolution 366 authorizes the investigation of three subjects; two of them relate to the study of internal security laws, the third to investigation of "subversive activities", not defined except in that they are "not limited to . . . movement[s] seeking to overthrow the Government of the United States by force and violence." As Judge Youngdahl said, "No indication is given as to what else is deemed subversive, nor is the court aware of a satisfactory definition." 154 F. Supp. at 609.

The Senate Resolution is far more imprecise than the House charter criticized in *Watkins* but upheld in *Barenblatt*. The House resolution, said the Court in the latter case, "comes to us with a 'persuasive gloss of legislative history', *United States* v. *Witkovich*, 353 U.S. 194, 199, which shows beyond doubt that in pursuance of its legislative concerns in the domain of 'national security' the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country" 360 U.S. at 118. The Court held that in the light of the House Committee's prior investigation of Communist activities in education, sanctioned by the House *prior* to the hearing in *Barenblatt*, that subject was embraced by the resolution (360 U.S. at 121-123). In the

instant case, however, we do not have a comparable legislative gloss. The Government has yet to show that the Senate had ever approved investigations into communications media before petitioner here was subpoenaed.

Furthermore, *Barenblatt* approved the House Committee's charter on the ground that it was directed against propaganda for the forcible overthrow of government. But in the instant case, the Senate has expressly provided that the "subversive activities" to be investigated are *not* limited to "movements seeking to overthrow the Government of the United States by force and violence." The Senate has thus given its Resolution 366 so great a breadth that quite aside from raising First Amendment problems, it makes the scope of authority unconstitutionally vague.

The Court touched upon this problem in *Sweezy* v. *New Hampshire*, 354 U.S. 234, where it reviewed a state contempt conviction under a state act defining a "subversive person" by reference of membership in certain organizations. The Court criticized the legislative failure to distinguish between adherence to an organization with knowledge of its purpose to overthrow the government by force and violence and mere membership, and said that New Hampshire was stamping citizens with a "stain of disloyalty" and "inhibiting . . . the flow of democratic expressions." The Senate Resolution is even vaguer since it does not even refer to organizations whose objective is directed against our institutions.

VII

The Subcommittee's Inquiry Was in Violation of Petitioner's Rights Under the First Amendment.

The subcommittee, by its own admission, was engaged at the time of petitioner's appearance in an investigation of the content of American newspapers. Such an investigation was a violation of the freedom of the press guaranteed by the First Amendment and not in furtherance of any proper legislative purpose. In addition, the questions addressed to petitioner related to political associations, likewise protected by the First Amendment. Further, the specific section of the subcommittee's charter under which it was apparently proceeding is directed against activities in a form requiring the most subjective of determinations and thereby was also infringing upon freedom of association. Finally, the claimed subject matter of the inquiry, namely, "Strategy and Tactics of World Communism", was equally so broad as to interfere with the right of association and communication.

Although the nature of the inquiry was never revealed to petitioner, the subcommittee, both prior to his appearance and subsequent thereto, made it quite plain that it was then engaged in an investigation directly affecting the freedom of the press. Thus, it was made quite clear that the subcommittee was launched on a project which could have no conceivably proper legislative purpose, but rather one blatantly in violation of the First Amendment proscription against governmental interference with a free press.

The presence of such frank and unequivocal declarations of purpose by the subcommittee distinguishes this case (and its companion cases) from any other which has ever come before this Court. On January 4, 1956, the day before

petitioner appeared and testified, Senator Eastland, the chairman of the subcommittee, referring to the testimony of a previous newspaperman witness who had named persons he knew as members of the Communist Party and speaking as to the purpose of the inquiry, said (59):

> "The subcommittee could not be unmindful of the fact that among the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration . . ."

Immediately following that statement, another member of the subcommittee, Senator Hennings, added (emphasis supplied):

> ". . . I do believe it is very important at the outset for us to make it abundantly clear . . . that this is in no sense an attack upon the free press of the United States.
>
> • • • • •
>
> ". . . it should be clear that *the best evidence of any subversion or infiltration into any news-dispensing agency or opinion-forming journal is certainly the product itself.*
>
> • • • • •
>
> ". . . Of course, *the committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency.*
>
> • • • • •
>
> ". . . But I would like . . . that it be generally known and understood that this is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show

> such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, *to influence or subvert the American press.*"

As to which, the chairman repeatedly noted his agreement (*ibid.*), commending Senator Hennings' statement as "a very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety" (Tr. 59).

Early in 1957, the subcommittee reported to its parent Committee on the Judiciary with respect to this very investigation in the course of which petitioner was called as a witness (Sen. Rep. 131, 84th Cong., 2d Sess. (Gov't Ex. No. 11)). In the course of that report, the subcommittee stated that it had "encountered considerable evidence of Communist activities in the press, radio, television, and in political matters" (*id.* 95), stating, in part, as follows:

> "... Communists have made vigorous and sustained efforts to infiltrate the American press and radio and to entrench their members in all other forms of mass communications, where, *by emphasis or omission of the written or spoken word, it may be turned to the advantage of the conspiracy*" (*ibid.*, emphasis supplied).

During the course of this report, the subcommittee referred to its interrogation of petitioner, who, as it noted, at the time of his testimony, "was a reporter on the New York Daily News" (*id.* 102). Coupled with that reference were similar references to the other newspaper employees it had summoned and interrogated during the course of this investigation. And the subcommittee thereupon concluded:

> "Communists have infiltrated mass communications media in the United States, and efforts to increase such infiltration continue." (*id.* 117).

Thus, the subcommittee stands self-accused. By its own confession, it has divested itself of the many guises under which it has heretofore sought to justify its investigations. It is here unequivocally declaring: "This was our objective in calling William Price, New York Daily News reporter, and the other newspaper men and women as witnesses:—We are concerned about the people who, by their newspaper writings, are influencing public opinion. We are dissatisfied with the way in which their writings are influencing public opinion. We are investigating what they write and why they write as they do."

As Mr. Walter Lippmann observed, at the very time petitioner and his fellow-newspapermen were being questioned: "Does Congress have the right to investigate the press; and if it has, what if any are the limits of that power? . . . In what former generation, if ever before, in our history has the Government claimed the power to examine and pass judgment upon who shall work on newspapers? . . . Once it is the accepted principle that Congress has power to set up standards of newspaper employment, the inner spirit and the practical meaning of the First Amendment will be deeply impaired." N. Y. Herald Tribune, Jan. 10, 1956.

Clearly, this investigation could have had no conceivably proper legislative purpose. Assuming the subcommittee had disclosed that a disproportionate number of Communist Party members had succeeded in securing newspaper employment, the Congress obviously could not constitutionally bar such members from such employment. Nor could it constitutionally enact a law regulating the content of journalistic writings or establishing a system of censorship, direct or indirect, with respect to such writings.

Although it refused to disclose the nature of its inquiry to petitioner, to whom due process required such disclosure,

it has now revealed the purpose of that inquiry to the public and to the courts. That purpose, so plainly revealed, is ostensibly beyond constitutional limitations. As this Court said, in *United States* v. *Rumely*, 345 U.S. 41:

> "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment. In light of the opinion of Prettyman, J., below and of some of the views expressed here, it would not be seemly to maintain that these doubts are fanciful or factitious . . . Whenever constitutional limits upon the investigative power of Congress have to be drawn . . ., it ought only to be done after Congress had demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience admonishes us to tread warily in this domain . . ."

It is true that the subcommittee claimed to be investigating "Strategy and Tactics of World Communism" (R. 62-64, 64-65), but this, in itself, is a phrase of unlimited breadth and, therefore, of particular danger to First Amendment rights. It would be a work of supererogation for counsel to remind this Court of what this subcommittee and its sister subcommittee in the House of Representatives has regarded in the past as included in the term "Communism". Suffice it to say that many of our greatest liberal scholars and many of the best movements for human welfare have come under the proscription of these subcommittees.

It is particularly significant that the section of Senate Resolution 366 under which the subcommittee was apparently proceeding related not to the administration of the Internal Security Act of 1950, not to laws relating to espionage, sabotage and the like, but to "the extent, nature and effects of subversive activities". This is particularly significant because the same section provides that the subversive activities are:

> "... not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

The opinions of this Court have previously considered similar language in *Sweezy* v. *State of New Hampshire*, 354 U.S. 234, 236, 246, 247, 253, 254.

Finally, it is significant that the petitioner was subpoenaed because he had signed a petition to the President of the United States on the subject of prosecution under the Smith Act. 54 Stat. 670. That this was an erroneous impression of the subcommittee does not mitigate its evident purpose in interfering with the exercise of a First Amendment right. Equally important in determining the impact upon the First Amendment is the inquiry of the petitioner concerning his background as a newspaperman.

It is true that many of the questions set forth in the indictment do not relate to the subject of communications. That, however, does not mitigate the subcommittee's purpose, as expressed by it, to investigate the field of communications. On the contrary, it reinforces the fact that this was a roving inquiry in which the subcommittee made various excursions to subjects outside the claimed scope of

its inquiry into the press. *Cf. Sacher* v. *United States*, 356 U.S. 576. As to these, quite aside from their irrelevancy, we call the Court's attention to the unequivocal denial by the petitioner that he had engaged in criminal activities sought to be imputed to him (R. 44).

VIII

The Tribunal Before Which Petitioner Allegedly Committed the Contempts Charged Was Not a Competent Committee of the Congress.

The provisions of 2 U.S.C. 192 contemplated a tribunal duly authorized to sit as a committee in the Congress at the time the contempts charged were committed. For a "tribunal that is not competent is no tribunal and it is unthinkable that such a body could be the instrument of criminal conviction." *Christoffel* v. *United States*, 338 U.S. 84, 90. The Subcommittee in this case, however, was not duly authorized and competent to sit as a committee, as it purported to do, when petitioner allegedly committed the contempts for which he was convicted.

The Subcommittee was governed in its operations by the provisions of the Legislative Reorganization Act of 1946 (Aug. 2, 1946, c. 753, Tit. I, sec. 134(c), 60 Stat. 832, 2 U.S.C. 1190(b). The indictment explicitly alleges that the Subcommittee was then conducting hearings "pursuant to the Legislative Reorganization Act of 1946" (R. 1). Section 134(c) of that Act provides as follows:

> "No standing commitee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

It was stipulated at the trial, however, that:

(1) When petitioner appeared before the Subcommittee, on January 5, 1956, the Senate was in session (R. 111-112); and

(2) no leave was granted by the Senate for the Subcommittee to sit at that time (*Ibid.*).

Consequently, it is clear that, at the time of the petitioner's alleged contempts, the Subcommittee was sitting in violation of the controlling statutory restriction. In short, the Subcommittee was not then a tribunal competent to act as a committee of the Senate.

That the rule articulated in Section 134(c) of the 1946 Act is one available to petitioner as a defense to the prosecution here is demonstrated in the brief for petitioner in Argument VI, *Liveright* v. *United States*, No. 11, this Term, presented by the counsel here. We incorporate the argument there and respectfully refer the Court to that brief.

IX

The Indictment Was Invalid Because a Majority of the Grand Jurors Were Government Employees.

Petitioner was indicted on November 26, 1956 by a Grand Jury in the District of Columbia, a majority of whose members were Federal Government employees. Petitioner made a motion to dismiss the indictment and, alternatively, for a hearing in which to offer testimony to show bias on the part of the jurors. This motion was supported by an affidavit of counsel showing the fear engendered in Federal employees by the Government's loyalty and security programs. This motion, which was denied, was similar to that made by petitioner in *Liveright* v. *United States*, No. 11, this Term.

For purposes of this brief, we adopt and respectfully refer the Court to the argument made by petitioner *Liveright* in Point VII of his brief.

Conclusion

We submit that the indictment, trial and conviction of petitioner were in violation of his statutory and constitutional rights. For the reasons set forth above, the order of affirmance should be reversed, the judgment of conviction vacated and the indictment dismissed.

Respectfully submitted,

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Appendix

(Statutory Provisions Involved)

2 U. S. C. 192 (R. S. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) reads, as follows:

"Refusal of witness to testify

"Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

2 U. S. C. 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753 Title I, § 134 (c), 60 Stat. 832) reads, in pertinent part, as follows

"Authority of Senate standing committees and subcommittees; sitting while Senate or House in session

* * *

"(b) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

(Senate Resolution Involved)

Senate Resolution 366, 81st Cong. 2d Sess., reads as follows:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and

the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

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No. 13

In the Supreme Court of the United States

October Term, 1961

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 12

WILLIAM A. PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 1–5) is reported at 280 F. 2d 715. The opinion of the district court (J.A. 136–137; Pet. 17–18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (R. 5). On July 13, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including August 17, 1960. The petition was filed on August 7, 1960, and was granted on June 19, 1961 (R. 7; 366 U.S. 959). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Senate Resolution 366 of the 81st Congress and Senate Resolution 58 of the 84th Congress authorized the Internal Security Subcommittee to conduct the hearing at which petitioner appeared.

2. Whether petitioner can claim for the first time at his trial that, under the Legislative Reorganization Act of 1946, the Subcommittee could not properly hold the hearing at which he appeared and, if he can, whether the hearing was improperly held.

3. Whether the Subcommittee's investigation into Communist activities in the news media field violated petitioner's rights under the First Amendment.

4. Whether petitioner raised the question of pertinency at the time he refused to answer the questions, and, if not, whether he can claim that he was not apprised of their pertinency for the first time at his trial.

5. Whether the government proved that the questions petitioner refused to answer were pertinent to the subject under inquiry.

6. Whether the indictment was invalid because it failed to specify the subject under inquiry and the pertinency of the questions to that subject, did not allege that petitioner's failure to answer was wilful, and did not state the delegation of authority from the parent Committee to the Subcommittee.

7. Whether petitioner, who was indicted by a grand jury composed, in part, of federal employees, was entitled to dismissal of the indictment or a hearing on the basis of general allegations that such jurors were biased and afraid as a result of the government security program.

8. Whether the trial court denied petitioner the right of cross-examination.

9. Whether petitioner may raise a claim for the first time in his brief on the merits in this Court that the Subcommittee violated his rights under the Fourth and Fifth Amendments because it did not have probable cause to subpoena him.

STATUTES AND RESOLUTIONS INVOLVED

Relevant portions of 2 U.S.C. 192, as amended; the Legislative Reorganization Act of 1946, c. 753, Title I, Section 134, 60 Stat. 832 (2 U.S.C. 190b(b)); and Senate Resolution 366, 81st Cong., 2d Sess., are set forth in petitioner's brief at pp. 46–48. In addition, Section 2 of Resolution 366 states:

> The Committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the sessions, recesses, and adjourned periods of the Senate * * * as it deems advisable.

STATEMENT

Petitioner was charged in an eight-count indictment in the District Court for the District of Columbia with having refused, in violation of 2 U.S.C. 192, to answer eight questions, pertinent to matters under inquiry, put to him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 1). Having waived his right to trial by jury, petitioner was found guilty by the district court on all eight counts. He was sentenced to three months' imprisonment

and to pay a fine of five hundred dollars (J.A. 11). On appeal, the conviction was affirmed (Pet. 20).

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Internal Security Subcommittee heard the testimony of Winston Burdett, a newspaperman and broadcaster, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws.[1]

Burdett, who said that he had been a member of the Communist Party from 1937 until the early 1940's, testified concerning attempts by the Communist Party to influence public opinion by infiltration of Party members into the newspaper field. He stated that he became a member of the Party's unit in the Brooklyn Eagle in 1937 while employed by that newspaper (Hearings, Part 14, p. 1324); that the unit included several reporters and editorial writers (*id.*, at pp. 1325–1327, 1359–1360); that Party leaders induced him to become a foreign correspondent for the Eagle in order to use his position to act as an espionage agent for the Soviet Union and that he continued these activities while subsequently employed by Transradio Press and the Columbia Broadcasting System during World War II (*id.* at pp. 1328–1341, 1347–1353); and that employees of other New York newspapers had been Party members around 1940 (*id.* at pp. 1360–1363).

[1] Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate [hereinafter "Hearings"], 84th Cong., 1st Sess., Part 14, pp. 1323–1363.

The counsel of the Subcommittee testified at petitioner's trial concerning the reason petitioner was subpoenaed to testify. At the time petitioner was subpoenaed, the Subcommittee had information that petitioner, a newspaperman, had been a candidate for vice president of the New York Newspaper Guild in 1949 on the so-called "Rank and File" ticket, which was known to be the Communist-supported slate (J.A. 50–51, 100–101); that Communists had successfully infiltrated the Guild (J.A. 53, 100–102); that a statement in defense of the Communist Party appeared in the Daily Worker in 1941 signed by a William Price (J.A. 53); that petitioner had received numerous visits from Marcella Hitschmannova, who was known to be a Communist courier and to have served the Communist movement in other capacities for years (J.A. 52–53, 65, 96–97);[2] that these visits were continuing up until the time petitioner was called as a witness (J.A. 65); that petitioner, after returning from wartime naval service, had flown an airplane on a trip to Central and South America, during which time he was accompanied by a courier for the Communist Party (J.A. 54–55, 65). The Subcommittee, however, had no information that directly showed petitioner to be a member of the Communist Party (J.A. 55).

On the basis of this information, the Subcommittee decided to call petitioner as a witness in executive

[2] The Subcommittee also had other information concerning petitioner and Marcella Hitschmannova which could not be described at the trial because of its highly confidential nature (J.A. 52, 54–55).

session. Pursuant to subpoena, petitioner, accompanied by counsel, appeared and testified at executive session held in New York City on December 7, 1955 (J.A. 55). At the executive session, petitioner answered several preliminary questions as to his identity and backgroumd (J.A. 72–74), but refused to answer questions by the Subcommittee concerning the information described above (J.A. 76–79). Petitioner refused to answer these questions on the basis of a lengthy legal memorandum (Gov. Ex. 3; J.A. 25–34). This memorandum raised chiefly the objection that the Subcommittee was invading "my political beliefs, my religious beliefs, any other personal and private affairs, and my associational activities" protected by the First Amendment (J.A. 26), but also invoked the doctrine of separation of powers and the *ex post facto* and bill of attainder clauses of the Constitution (J.A. 28, 29–34).

After petitioner had completed his testimony in executive session, the Subcommittee and its counsel were convinced that petitioner possessed information which he was withholding and, further, that such information would be useful to the Subcommittee in its investigation. This conviction was based upon a number of factors, such as the testimony petitioner had given, the testimony apparently withheld, the manner in which petitioner withheld it, his "constant conferring with counsel about the questions which a man who had no information would find no difficulty in answering promptly," and his demeanor during the questioning (J.A. 85–86). The Subcommittee and its counsel were hopeful that petitioner, "if we

called him back and went at it right, would come clean and give the committee the information that we wanted," as had other witnesses on other occasions (J.A. 90). The Subcommittee believed that it "had information which if true made it clear that Mr. Price had a great deal of information over and above and beyond what we had, which would be of value to the committee" (J.A. 90–91).

The Subcommittee held public hearings in Washington, D.C., on January 4, 5, and 6, 1956. At the opening of the hearings on January 4, the Chairman of the Subcommittee announced that the hearings about to commence "stem from sessions of this subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster" (Gov. Ex. 8, p. 1587).[3] Burdett had, the Chairman continued, disclosed the names of persons whom he knew as members of the Communist Party in the early 1940's. The Chairman concluded that the investigation was of great importance because (*ibid.*):

> [A]mong the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. * * * The

[3] Government Exhibit 8 is Part 17 of the Hearings.

present hearings open up a subsequent chapter to the Burdett testimony of June 28 and 29, 1955.

Following the opening statement, another member of the Subcommittee, Senator Hennings, apparently apprehensive that the public might misconstrue the purpose of the hearings, further explained (Gov. Ex. 8, p. 1588):

> [T]his is not in any sense an attack upon the free press of the United States.
>
> * * *
>
> Of course, the Committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency.
>
> * * * [T]his is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed to influence or to subvert the American press.

In response, the Chairman approved Senator Hennings' description of the purpose of the hearings as a "very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety (*ibid*). The Chairman went on to say (*ibid.*):

> We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

Eighteen witnesses were called by the Subcommittee to testify at the hearings on January 4, 5, and 6, 1956.

All had been or were then employed in mass communications. Petitioner, together with the same counsel who had represented him at the executive session, appeared before the Subcommittee on January 5, 1956. Petitioner testified concerning his employment as a newspaper reporter and past service as a naval aviator (J.A. 17–18). He refused to answer whether he had been a candidate for vice president on the "Rank and File" slate of the New York Newspaper Guild in 1949 (J.A. 18–19). This refusal, as well as petitioner's subsequent refusal to answer other questions, was based upon the same legal memorandum which he had submitted to the Subcommittee at the executive session (J.A. 19).

Petitioner was then asked whether he was at that time a member of the Communist Party (count 1) (J.A. 23). After consultation with his counsel, petitioner refused to answer the question on the basis of the written memorandum which he relied on at the executive session, and "further on the grounds that no legislative purpose can be served by asking me, at this time again, questions, the answers to which this committee knows full well from the executive hearings" (J.A. 23). Petitioner likewise refused to answer whether he had "ever attended Communist meetings" (count 2) (J.A. 35):

> * * * on the grounds stated in my objection and on the further grounds that no legislative purpose can be served by asking this question again, inasmuch as the reply has already been elicited by this committee in executive session.

For these same reasons, petitioner refused to answer whether he knew Marcella Hitschmannova (count 3) (J.A. 36). The Subcommittee's counsel then informed petitioner of the Subcommittee's interest in the subject of this question: "Do you know, Mr. Price, that one Marcella Hitschmannova, now connected with the United Nations, was a courier for the Communist Party?" (J.A. 36). Petitioner persisted in his refusal to answer (J.A. 37).

Petitioner declined to answer a question as to whether he had ever flown an airplane for or at the direction of the Communist Party. His refusal was based on his previously stated grounds and for the reason that he had answered such a question in the executive session (J.A. 38). When asked whether he had ever flown outside the continental limits of the United States, he admitted that he had done so as a pilot for the United States Navy (J.A. 39). Upon being confronted with the transcript of the executive session—where he initially answered this question in the negative, and then, upon being informed of the reason for the question, refused to answer—petitioner contested the accuracy of the record (J.A. 40). After a colloquy at the public session between petitioner and the Chairman, petitioner ultimately admitted without qualification that he had flown outside the continental limits of the United States (J.A. 41).

Thereupon, petitioner was asked whether he had ever flown "considerable mileage in Central America and Latin America" (count 4). He refused to answer "on the grounds previously stated" (J.A. 41). For the same reason he refused to answer whether he had

flown a privately own airplane in South America and had another person along with him (count 5) (J.A. 41–42). Asked whether the person who accompanied him on that trip was a courier for the Communist International, petitioner at first noted that a similar question had been asked him in the prior executive session (J.A. 42). Upon being directed to answer, petitioner responded by giving his answer in the negative (J.A. 42). Thereupon, the Subcommittee inquired (count 6) (J.A. 43):

> For the sake of testing the credibility of your answer to that question, I ask you this: Who was the person who accompanied you on that lengthy flight in Latin and Central America?

Petitioner stated that he "would like to know what right the committee has in testing my credibility" (J.A. 43). Upon being directed to answer the question, petitioner refused "on the same grounds as previously stated" (J.A. 43). He disclaimed any claim of right or privilege under the Fifth Amendment (J.A. 43).

As the public session was about to close, petitioner made a lengthy statement in which he denied that he had (J.A. 44):

> * * * ever been involved in such an activity as suggested here in any way whatsoever at anyone's direction, at the direction of any of the organizations as were mentioned in the closed hearings, or any such organizations; that anyone who ever flew with me was ever engaged in such an activity; that I ever had knowledge of such activity; or that I was ever

> approached to participate in such an activity; * * *.

The counsel for the Subcommittee then stated (J.A. 44):

> I think, in view of this question, Mr. Chairman, this statement by the witness again, we should have a question, or perhaps several questions, going to the credibility of the statement.

Committee counsel then asked petitioner when he had "made this lengthy trip to Latin and Central America" (count 7) (J.A. 44). Petitioner declined to answer the question "on the grounds stated in the objection, and on the additional grounds that my credibility as a witness is not at question here" (J.A. 44).

Petitioner thereafter answered a series of further questions related to his unsolicited statement, admitting only that he had taken a trip to South America in order to sell an aircraft and to do some free-lance stories along the way (J.A. 45). He testified that the airplane was his own and that he sold it to someone whose name he did not recall in Panama City who he believed was a resident of Panama or a United States resident of the Canal Zone. Petitioner also testified that he contacted the buyer through an advertisement in a Panama City newspaper, and that he went to Panama to sell the airplane because he had heard there was a good market for airplanes in Central America (J.A. 45–47). Finally, petitioner was asked and refused to answer whether he had ever

been a member of the Communist Party (count 8) (J.A. 47).

SUMMARY OF ARGUMENT

I

As we have shown in our brief in *Liveright* v. *United States*, No. 11, this Term, pp. 19–28, Senate Resolution 366, which established the Subcommittee, is sufficiently clear, at least when taken together with its history, to authorize the Subcommittee to investigate Communist activities. There is no basis for carving an exception out of this general authorization for Communist activities in news media, which was the subject under inquiry when petitioner testified. Subsequent to this investigation and other investigations into Communist activities in closely related areas, the Senate passed resolutions authorizing the Subcommittee to continue its investigations and providing appropriations for the purpose. Thus, this issue is squarely controlled by *Barenblatt* v. *United States*, 360 U.S. 109, 121, where this Court held that, "[n]ot only is there no indication that the House ever viewed the field of education as being outside the Committee's authority under Rule XI, but the legislative history affirmatively evinces House approval of this phase of the Committee's work."

II

Petitioner claims that, under the Legislative Reorganization Act of 1946, the Subcommittee could not properly hold the hearing at which he appeared, since it had not received permission from the Senate to

hold a hearing while the Senate was in session. We have shown in our briefs in *Shelton* v. *United States*, No. 9, this Term, pp. 25–29, and *Liveright, supra*, pp. 28–32, that a witness before a Congressional committee who refuses to answer its questions is not entitled to raise objections to the committee's procedures which he has not raised before the committee. We have also shown in our brief in *Liveright*, pp. 32–33, that, in any event, this contention is without merit.

III

For the reasons stated in our brief in *Shelton, supra*, this Term, pp. 48–50, the Subcommittee's investigation did not violate the First Amendment.

IV

Petitioner cannot excuse his refusal to answer by the alleged lack of pertinency of the questions.

A. He made no objection before the Subcommittee to the pertinency of any of the questions on which he was indicted and convicted. Therefore, as shown in our brief in *Shelton, supra*, pp. 25–29, he cannot claim that the Subcommittee failed to apprise him of the subject under inquiry or the pertinency of the questions to that subject.

B. The government proved that the subject under inquiry when petitioner testified was Communist activity in news media. The Chairman of the Subcommittee and one of its members clearly stated, the day before petitioner testified, that Communist activity in news media was the purpose of the hearings; all the witnesses who testified at the hearings worked

in this field; and petitioner's counsel repeatedly said at petitioner's trial that this was the subject of the hearings. The pertinency to this investigation of three of the questions petitioner refused to answer—whether petitioner, who was admittedly a newspaper reporter, was or had ever been a Communist or had attended Communist meetings—was obvious.

Petitioner contends that the Subcommittee counsel testified and the Assistant United States Attorney stated at the trial that the subject under inquiry was Communist activities generally. This subject, however, is perfectly consistent with the subject of Communist activities in news media; the latter is merely a portion of the broader subject. Moreover, if the subject was Communist activities generally, this is a proper subject within the the authority of the Subcommittee (see our brief in *Liveright, supra,* pp. 42–44) and all eight questions were pertinent, either on their face or as shown by the government's evidence at the trial, to this subject.

V

Petitioner claims that he was entitled to dismissal of the indictment or at least a hearing because of the bias of government employees who were on the grand jury. We have shown in our brief in *Shelton, supra,* pp. 62–76, that a defendant cannot challenge an indictment because of the bias of grand jurors unless he can show specific and convincing evidence of strong bias in individual grand jurors. Here, as in *Shelton,* petitioner made no allegations with respect to individual grand jurors and did not even state any spe-

cific facts of bias among goverment employees generally.

VI

Petitioner contends that the indictment was required to specify the subjects under inquiry and the pertinency of the questions to those subjects, to allege that petitioner's refusal to answer as wilful, and to state the delegation of authority from the present committee to the Subcommittee. We point out in our brief in *Shelton, supra,* pp. 78–83, that under Rule 7(c) of the Federal Rules of Criminal Procedure and the decisions of this Court and the courts of appeals, an indictment need not specify the subject under inquiry. For the same reasons, it need not provide the reasoning underlying the allegation that the questions were pertinent. We have shown in our brief in *Liveright, supra,* pp. 50–51, that an indictment need not allege that the witness' refusal to answer the questions was wilful if, as here, the indictment alleges that the witness has "unlawfully" refused to answer.

Petitioner's contention that the indictment did not state the delegation of authority from the present Judiciary Committee to the Subcommittee was not presented in the petition for a writ of certiorari and therefore it is not before the Court. In any event, no court has ever suggested that such an allegation is necessary under Rule 7(c) even though, insofar as we know, no indictment under 2 U.S.C. 192 has made such an allegation.

VII

Petitioner was not deprived of his right of cross-examination by the trial court's denial of his motion to subpoena the Subcommittee's files and its refusal to allow him to ask certain questions on cross-examination of the Subcommittee counsel concerning the information on the basis of which the Subcommittee subpoenaed petitioner. The trial court allowed petitioner the opportunity to cross-examine the Subcommittee counsel on this subject extensively. It merely refused to allow him to subpoena the files of the Subcommittee and to secure from Subcommittee counsel confidential information, *i.e.*, the identity of the Subcommittee's confidential informants, information which would have provided considerable indication of their identity, and information as to the manner in which the Subcommittee secured confidential information. As we show in our briefs in *Shelton, supra,* pp. 59–60, and *Liveright, supra,* pp. 51–57, a witness who refuses to answer questions before a Congressional committee is not entitled to disclosure of the files of the committee, either directly or by cross-examination of a government witness, before he can be punished for contempt.

VIII

Petitioner claims that his rights under the Fourth and Fifth Amendments were violated. He cannot raise this contention, however, since it was not raised before the Subcommittee, at his trial, in the court of appeals, or even in his petition for certiorari. In

any event, the Fourth Amendment does not apply to subpoenas to testify as opposed to subpoenas *duces tecum* (see our brief in *Shelton, supra,* pp. 43–46). Similarly, the due process clause of the Fifth Amendment is not relevant. But even if the Fourth and Fifth Amendments do apply, they require—like the First Amendment as construed in *Barenblatt, supra,* 360 U.S. at 134—only that the committee have reasonable basis for believing that the witness has information of value to the investigation (see our brief in *Shelton,* pp. 46–48, 50–55). Here, the Subcommittee had considerable information that petitioner, admittedly a newspaperman, had been engaged in Communist activities.

ARGUMENT

Petitioner was convicted of refusing to answer eight questions asked him by a Congressional committee concerning the Communist Party—whether he was at that time a member of the Communist Party (count 1); whether he had ever attended Communist meetings (count 2); whether he knew Marcella Hitschmannova (count 3); whether he had flown considerable mileage in Latin America (count 4); whether he, along with another person, had flown a privately-owned plane in South America (count 5); who had accompanied him on a lengthy flight in Latin America (count 6); when he had made the lengthy trip to Latin America (count 7); and whether he had ever been a member of the Communist Party (count 8). Since this Court has upheld the constitutional validity of the questions involved in counts 1 and 8 (*Barenblatt* v. *United States,* 360 U.S. 109, 114–115, 126 at note 25), and since their perti-

nency is particularly clear (*id.* at 125), we will stress these two questions. Petitioner was given a general sentence and a fine on all eight counts which was less than the maximum authorized by 2 U.S.C. 192 under any one count; therefore, the judgment below must be affirmed if any one of the counts is valid. *E.g., Barenblatt* v. *United States,* 360 U.S. at 115 In addition, we submit that petitioner was properly convicted on all eight counts.

I

THE RESOLUTIONS ESTABLISHING AND CONTINUING THE SENATE SUBCOMMITTEE ON INTERNAL SECURITY AUTHORIZED THE SUBCOMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES IN THE UNITED STATES

Petitioner claims (Pet. Br. 34–36) that the resolution authorizing the Internal Security Subcommittee is "unconstitutionally vague." As we show in our brief in *Liveright* v. *United States,* No. 11, this Term, pp. 19–28, however, this Subcommittee has been authorized to investigate Communist activities. S. Res. 366, 81st Cong., 2d Sess.; S. Res. 58, 84th Cong., 1st Sess. Therefore, the Subcommittee was authorized to question petitioner concerning the subject under inquiry when petitioner testified—*i.e.,* Communist infiltration of news media (see *infra,* pp. 26–27).

Petitioner suggests (Pet. Br. 36) that, whatever scope Senate Resolution 366 may have, it does not authorize an investigation of Communist activities in news media. A similar contention was raised in *Barenblatt* that Rule XI relating to the House Un-American Activities Committee did not include Communist activities in the field of education. This contention, however, was

rejected because the Court found that, "[n]ot only is there no indication that the House ever viewed the field of education as being outside the Committee's authority under Rule XI, but the legislative history affirmatively evinces House approval of this phase of the Committee's work" (360 U.S. at 121). The Court then noted that the Committee had conducted previous investigations in education.

There are at least as strong reasons for not carving an exception for Communist activities in news media out of the Subcommittee's pervasive authority to investigate Communist activities. First, the news media are no more within the protection of the First Amendment than is college education. Indeed, the concurring opinion in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 261–263, indicated that college education is perhaps a particularly sensitive area. Thus, there is no constitutional reason why the language and history of Senate Resolution 366, giving authority to the Subcommittee to investigate Communist activity generally, should not be applied to include what is logically a portion of this general subject, Communist activities in the news media.

Second, as in *Barenblatt,* the legislative history of Senate Resolution 366 and its successors shows that the Senate approved this phase of the Subcommittee's work. The Subcommittee had earlier conducted investigations of Communist activities in areas closely related to the subject of investigation here—Communist activities in the fields of radio and television, in the field of education, and in propaganda (see our brief in *Liveright,* pp. 26–27, note 6). After the

investigation involved here, the Subcommittee in 1955 conducted hearings entitled "Communist Activity in Mass Communications," which inquired into "the question, among others, of whether Communists are active under cover of accreditation of the United Nations as correspondents and otherwise." Hearings, Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, United States Senate, *Communist Activity in Mass Communications,* 85th Cong., 2d Sess., p. 1. And, of course, the Subcommittee heard the testimony of Winston Burdett (see *supra,* p. 4) and conducted the hearings involved in this case, both of which involved Communist activities in the communications field.

Subsequent to, and with full knowledge of, all these investigations, the Senate has passed resolutions authorizing the Subcommittee to continue its investigations and providing appropriations for this purpose (see our brief in *Liveright, supra,* pp. 27–28). Indeed, in 1956 (shortly after the hearing involved here), the Senate extended the life of the Subcommittee with the same jurisdiction and appropriated a large sum (S. Res. 174, 84th Cong., 2d Sess.) on the basis of the Subcommittee's 1955 Report. See S. Rept. 1385, 84th Cong., 2d Sess. That report described Winston Burdett's testimony concerning Communist infiltration of the press and stated that subsequent hearings confirmed his testimony and provided new information on such infiltration into various New York newspapers (*id.* at p. 4). The report

then said "[t]he subcommittee's investigation, which was set in motion by Mr. Burdett's revelations, had not been completed at the end of 1955" (*ibid.*).

II

PETITIONER CANNOT CLAIM FOR THE FIRST TIME AT HIS TRIAL THAT UNDER THE LEGISLATIVE REORGANIZATION ACT OF 1946 THE SUBCOMMITTEE COULD NOT PROPERLY HOLD THE HEARING AT WHICH HE APPEARED. EVEN IF PETITIONER COULD MAKE THIS CONTENTION, SENATE RESOLUTION 366 AUTHORIZED THE HEARING

Petitioner asserts (Pet. Br. 43–44) that the Subcommittee when he appeared before it was not a competent tribunal because the Legislative Reorganization Act of 1946 (see Pet. Br. 46) provides that "[n]o standing committee of the Senate * * * shall sit, without special leave, while the Senate * * * is in session." This contention is without merit.

A. First, as we have shown in our briefs in *Shelton* v. *United States*, No. 9, this Term, pp. 25–29, and *Liveright* v. *United States*, *supra*, pp. 29–32, a witness before a Congressional committee is not entitled to raise objections to the procedures followed by the committee at his trial for contempt which he has not raised before the committee itself. See *United States* v. *Bryan*, 339 U.S. 323, 330–335; *Emspak* v. *United States*, 203 F. 2d 54, 56 (C.A. D.C.), reversed on other grounds, 349 U.S. 190. Here, petitioner's refusal to answer the questions asked by the Subcommittee was based on precisely the same statement of legal argument and authorities relied on by the petitioner in *Liveright*. In neither case did the witness even sug-

gest any objection to the authority of the Subcommittee (see *supra*, p. 6).[4]

B. In any event, we have shown in our brief in *Liveright, supra*, pp. 32–33, that petitioner's contention under the Legislative Reorganization Act of 1946—that the Subcommittee could not hold the hearing while the Senate was in session—is without merit.

III

THE SUBCOMMITTEE'S INVESTIGATION DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner claims (Pet. Br. 37–43) that the Subcommittee's investigation violated his rights under the First Amendment. As we have demonstrated, however, in our brief in *Shelton, supra*, pp. 48–50, which involved the same investigation and hearings, petitioner's contention is without merit. Here, as in *Shelton*, the Subcommittee was investigating Communist infiltration of news media, not the news media themselves (see *infra*, pp. 26–27). All the questions asked petitioner plainly related to Communist activities.[5]

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[4] If petitioner had objected when he appeared before the Subcommittee, the Subcommittee could have easily met his objections by simply holding the hearing when the Senate was not in session.

[5] Petitioner contends (Pet. Br. 40) that the Subcommittee could have had no valid legislative purpose when it subpoenaed him since it could not constitutionally pass legislation barring Communists from being newspapermen or regulating the content of newspapers. Even if such legislation would be unconstitutional, however, petitioner's two suggested statutes are clearly not the only legislation which can result from an investigation of Communist activity in news media either alone or particularly when combined with investigations of Communist activity in other fields.

IV

PETITIONER, HAVING FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS BEFORE THE SUBCOMMITTEE, CANNOT CLAIM AT HIS TRIAL THAT HE WAS NOT SUFFICIENTLY APPRISED OF THE SUBJECT UNDER INQUIRY AND THE PERTINENCY OF THE QUESTIONS. THE QUESTIONS PETITIONER REFUSED TO ANSWER WERE PERTINENT TO THE SUBJECT UNDER INQUIRY

Petitioner contends (Pet. Br. 22–27) that (1) the Subcommittee failed to apprise him when he appeared before it of the subject under inquiry and the pertinency of the questions he refused to answer to this subject; and (2) the government failed to prove at his trial what the subject under inquiry was and the pertinency of the questions he refused to answer to this subject.

A. PETITIONER FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS ON WHICH HE WAS CONVICTED BEFORE THE SUBCOMMITTEE AND THEREFORE CANNOT CLAIM AT HIS TRIAL THAT HE WAS NOT APPRISED OF THEIR PERTINENCY

In our brief in *Shelton, supra,* pp. 25–29, we show that a witness before a Congressional committee cannot claim that the committee has failed to apprise him of the subject under inquiry and the pertinency of the questions asked him to this subject unless he raises the issue of pertinency before the committee itself. *Barenblatt* v. *United States, supra,* 360 U.S. at 123–124; *Deutch* v. *United States,* 367 U.S. 456, 469. He cannot wait until trial to raise an objection which the committee could easily remedy.

Petitioner failed to object before the Subcommittee on grounds of pertinency to the questions on which he was indicted and convicted. Earlier, in refusing to answer a question on which he was not indicted, he

inquired of the Subcommittee "why this question is put" (J.A. 18). We doubt, however, that this objection raises the issue of pertinency with the clarity required by the *Barenblatt* and *Deutch* decisions (see our brief in *Shelton, supra,* pp. 28–29). Moreover, this objection was not repeated or even suggested when petitioner refused to answer the questions which are involved here. Instead, he relied entirely on his lengthy legal memorandum (Gov. Ex. 3; J.A. 25–34)—which raised only constitutional objections based on the First Amendment, separation of powers, and the *ex post facto* and bill of attainder clauses—and in addition on his oral claim that the Subcommittee had no valid legislative purpose (J.A. 23, 35, 36, 38). The only suggestion of an objection to pertinency in the memorandum is the statement in petitioner's memorandum that petitioner "might wish to * * * challenge the pertinency of the question to the investigation" (J.A. 33). Considering the very same statement in a substantially similar legal memorandum,* this Court held in *Barenblatt* that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, and buried as they were in the context of [the witness'] general challenge to the power of the Subcommittee * * *" (360 U.S. at 124). Therefore, here, as in *Barenblatt,* the witness failed "to trigger what would have been the Subcommittee's reciprocal obligation" to explain the pertinency of the questions, and the witness is fore-

* See the record in *Barenblatt* v. *United States*, No. 35, Oct. Term, 1958, pp. 227–235.

closed from raising the issue for the first time in the contempt proceeding.

B. THE QUESTIONS PETITIONER REFUSED TO ANSWER WERE IN FACT PERTINENT

We submit that the government sufficiently proved at the trial that the subject under inquiry when petitioner testified was Communist activity in news media by introducing the transcript of the hearings on January 4, 5, and 6, 1956 (Gov. Ex. 8). At the beginning of the hearings on January 4, the Chairman of the Subcommittee indicated that the purpose of the hearings was to investigate this subject (see *supra*, pp. 7–8). Senator Hennings, another member of the Subcommittee, reiterated that "the Committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency" and the investigation was "an effort on the part of this Committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press" (see *supra*, p. 8). Again, on January 6, the day after petitioner testified, the Chairman stated that the hearings were directed to investigating infiltration of persons identified as Communists into news agencies (Gov. Ex. 8, p. 1717). And Senator Hennings said (*id.* at p. 1718):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts, or indeed, all consummations of efforts of the

> Communist Party to infiltrate newspapers or other media of communication.

All eighteen witnesses who testified at the hearings on January 4, 5, and 6, 1956, worked in the news media field.

In addition, the Subcommittee counsel testified at petitioner's trial that the information the Subcommittee possessed which caused petitioner to be subpoenaed included information that petitioner was a newspaperman and that he had participated in several Communist activities. These activities included running on the Communist-supported "Rank and File" slate for vice-president of the New York Newspaper Guild, which had been infiltrated by Communists (see *supra*, p. 5). The first question which petitioner refused to answer (although he was not indicted for this refusal) concerned whether he had been a candidate for vice-president of the Guild on the "Rank and File" slate (see *supra*, p. 9). When petitioner asked "why this question is put," the Subcommittee counsel answered: "The question is put to qualify you as a person of whom we can ask questions with respect to the persons who were on that slate and the manner in which that slate was supported" (J.A. 18).

At petitioner's trial, his counsel acknowledged, although he used varying descriptive terms, that the subject under inquiry which the government had proved was Communist infiltration of the press. Thus, he said that the subject was "the press" (Tr. 245, 246, 259); "Communist [redacted] infiltrat[redacted] of "mass communication media in the United States"

(Tr. 259); and "the newspapers and Communism in the newspaper field" (Tr. 289). Indeed, counsel stated that it is "crystal-clear that what this subcommittee was interested in was to determine whether there were Communists working in the press" (Tr. 340). It was on the basis of these facts that the defense argued that the questioning of petitioner violated freedom of the press guaranteed by the First Amendment (Tr. 245–266) and that Congress was not acting pursuant to a legislative purpose because it cannot legislate concerning the "content of the press" (Tr. 245–266, 340–342).

The first two questions and the last question on which petitioner was convicted were pertinent on their face to the subject of Communist activities in news media. These questions were whether petitioner, who was admittedly a newspaper reporter (J.A. 17), was at that time a member of the Communist Party (count 1); whether he had ever attended Communist meetings (count 2); and whether he had ever been a member of the Communist Party (count 8). As this Court said in *Barenblatt, supra,* where a Congressional committee was investigating Communist infiltration of education: "petitioner refused to answer questions as to his own Communist Party affiliations, whose pertinency was of course clear beyond doubt." 360 U.S. at 125.[1] As we have noted (see pp. 18–19), if these questions alone were perti-

[1] The other questions on which petitioner was convicted clearly related to Communist activities (see *supra*, pp. 5, 10–12). The record, however, does not show that they related to Communist activities in news media.

nent, petitioner's conviction must be upheld since he was given a general sentence on all counts.

Petitioner, however, emphasizes (Pet. Br. 25) that the Subcommittee counsel "expressly disclaimed that 'Communist infiltration into the field of communications' was the subject of hearings." This statement, which was made to another witness (Gov. Ex. 8, p. 1616), cannot overcome the clear statements—made both before and after counsel's brief remark—by both the Chairman of the Subcommittee and Senator Hennings that Communist infiltration of news media was the subject under inquiry.

Petitioner also contends (Pet. Br. 25–26) that the Subcommittee counsel stated at the hearings (also to another witness) (Gov. Ex. 8, p. 1652) and the Assistant United States Attorney argued at petitioner's trial (J.A. 130–133) that the purpose of the investigation was to investigate Communist activities generally. As we have shown in our brief in *Shelton, supra,* p. 36, the subject of Communist activities in news media is merely a portion of the broader subject of Communist activities generally. Thus, when the Subcommittee counsel and the Assistant United States Attorney stated that the Subcommittee was investigating Communist activities generally, this did not preclude proof that it was simultaneously investigating Communist activities in news media.* Moreover, if there was an inconsistency

*The other statements made by the Subcommittee counsel at petitioner's trial, on which petitioner relies (Pet. Br. 24), similarly do not help his position. They say merely that (1) the Subcommittee was investigating "several allied fields" of Communist activity (J.A. 54) (which is consistent with

between the ambiguous testimony at the trial by the Subcommittee counsel and the clear statements at the hearings by the Chairman and another member of the Subcommittee, the latter evidence is clearly controlling. And if there is any inconsistency between the ambiguous statements of the Assistant United States Attorney at petitioner's trial and the clear statements of the Subcommittee members at the hearings, certainly it is the evidence introduced by the government, not the government's characterization of this evidence, which is controlling.

Furthermore, even if petitioner were correct and the subject under inquiry was Communist activities in the United States generally, the government proved the pertinency of all eight questions on which petitioner was convicted. All eight, either on their face or as shown by the explanations to petitioner at the hearing and the testimony of the Subcommittee counsel at petitioner's trial (see *supra*, pp. 5, 10–12), were directly related to Communist activities. And as we indicate in our brief in *Liveright, supra*, pp. 42–44, this Court has never required that a Congressional committee investigate only one narrowly defined subject at a given time. It is enough that the committee have a subject under inquiry and that the

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the subject stated by the Subcommittee of Communist activity in news media); (2) that "strategy and tactics of World Communism" is the general subject which the Subcommittee had been investigating and it was affixed as an editorial title to the transcript of these and other hearings (J.A. 61–62) (a subject of which Communist activity in news media is a part); and (3) that the *authority* of the Subcommittee includes any organization, including the Communist Party, attempting to overthrow the government of the United States by force (J.A. 84–85).

questions which a witness is asked be pertinent to this subject.

V

PETITIONER WAS NOT ENTITLED TO DISMISSAL OF THE INDICTMENT OR A HEARING, ON THE BASIS OF BROAD ALLEGATIONS THAT GOVERNMENT EMPLOYEES GENERALLY ARE BIASED

Petitioner contends (Pet. Br. 44–45) that the indictment should have been dismissed because the grand jury included government employees who were biased against him because of the government's loyalty and security programs. Alternatively, petitioner argues that he was entitled to a hearing in the district court to allow him to prove bias. As we have shown, however, in our brief in *Shelton* v. *United States*, *supra*, pp. 62–64, a defendant is not entitled to dismissal of the indictment merely because government employees were on the grand jury. We have also argued in our brief in *Shelton* (pp. 64–76) that a defendant is entitled to a hearing to inquire into the activities and beliefs of grand jurors—even if we assume, contrary to the holdings of numerous cases, that a defendant is sometimes entitled to such a hearing—only when he alleges specific and convincing evidence of strong bias in individual grand jurors. Here, however, as in *Shelton* (see our brief in *Shelton*, pp. 76–78), petitioner's Motion to Dismiss the Indictment (J.A. 3–7) and accompanying affidavit (which is virtually identical with that in *Shelton;* see the record in No. 9, this Term, pp. 4–8) * did not allege bias or fear with re-

* The affidavit is identical with that submitted to the trial court by the petitioner in *Liveright* v. *United States*, *supra*.

gard to any individual grand juror and did not even state any specific evidence of fear or intimidation among government employees generally resulting from the security program which petitioner would show if a hearing were granted. In these circumstances, the trial court properly refused to grant petitioner a hearing to conduct a general exploration of the motives and beliefs of the grand jurors.

VI

THE INDICTMENT WAS NOT REQUIRED TO SPECIFY THE SUBJECT UNDER INQUIRY OR THE PERTINENCY OF THE QUESTIONS TO THIS SUBJECT, OR TO ALLEGE THAT PETITIONER'S REFUSAL TO ANSWER WAS WILFUL, OR TO STATE THE DELEGATION OF AUTHORITY FROM THE PARENT COMMITTEE TO THE SUBCOMMITTEE

The indictment upon which petitioner was convicted alleged that the questions petitioner refused to answer "were pertinent to the question then under inquiry" and that "the defendant unlawfully refused to answer those pertinent questions" (J.A. 1). Petitioner claims (Pet. Br. 15–20) that the indictment was invalid because it failed (1) to specify the subject under inquiry when petitioner testified, (2) to specify the pertinency of the questions he refused to answer to this subject, (3) to allege that his refusal to answer was wilful; and (4) to state the delegation of authority from the parent Judiciary Committee to the Subcommittee.

As we have shown in our brief in *Shelton* v. *United States*, *supra*, pp. 78–83, petitioner's contention that the indictment was required to state the specific subject under inquiry is inconsistent with Rule 7(c) of

the Federal Rules of Criminal Procedure and with decisions both of this Court and the courts of appeals. For the same reasons, an indictment which states that the questions are pertinent to the subject under inquiry need not provide the specific reasoning underlying this allegation of pertinency. As to petitioner's contention that the indictment was required to state that his refusal to answer was wilful, we have shown in our brief in *Liveright* v. *United States, supra* pp. 50–51, that it is sufficient if, as here, the indictment alleges that the witness has "unlawfully" refused to answer.

Petitioner also contends that the indictment was invalid because it did not state that the Judiciary Committee had authorized the Subcommittee to act and did not give the basis of this authority. Petitioner, however, did not raise this issue in his petition for a writ of certiorari (see Pet. 3, 13). Therefore, under Rule 40(1)(d)(2) of the Rules of this Court, the issue is not properly before the Court unless perhaps it constitutes "plain error." We submit that not only is there no plain error, but that the indictment was plainly valid.

The indictment alleged that the hearings were being conducted by a Subcommittee of the Judiciary Committee "pursuant to * * * Senate Resolution 366 of the 81st Congress and 58 of the 84th Congress" (J.A. 1), which authorize the Judiciary Committee or one of its subcommittees to investigate Communist activities (see our brief in *Liveright supra*, pp. 19–28). Thus, the indictment clearly implies that the Judiciary Committee authorized the Subcommittee to investigate Communist activities.

Certainly, it is not necessary under Rule 7(c) of the Federal Rules of Criminal Procedure—which states that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged"—to allege the specific resolution of the parent committee authorizing the subcommittee's investigation. We know of no indictment under 2 U.S.C. 192 which makes such an allegation and yet, as far as we or petitioner have been able to ascertain, no court has dismissed an indictment on this ground. The only case cited by petitioner (Pet. Br. 19–20), *United States* v. *Lamont*, 236 F. 2d 312, 315–316 (C.A. 2), holds merely that the indictment must state the authority of the parent committee—a requirement which the indictment here expressly satisfied."

VII

THE TRIAL COURT DID NOT DENY PETITIONER THE RIGHT OF CROSS-EXAMINATION BY DENYING HIS MOTION TO SUBPOENA THE SUBCOMMITTEE'S FILES AND REFUSING TO ALLOW CROSS-EXAMINATION WHICH SOUGHT TO OBTAIN CONFIDENTIAL INFORMATION

Petitioner contends (Pet. Br. 30–34) that he was improperly restricted in his right of cross-examination by the trial court's denial of his motion to sub-

[10] Petitioner also claims (Pet. Br. 15–16) that the indictment was defective in that "it merely stated the offense in the generic term of the statute * * *." As we have shown in our brief in *Shelton*, *supra*, pp. 79–80, recent decisions of this Court make clear that such an allegation is sufficient under Rule 7(c), F.R. Crim. P., and the Fifth Amendment.

poena the Subcommittee's file and its refusal to allow him to cross-examine the Subcommittee counsel concerning the information on which the Subcommittee subpoenaed petitioner.

Petitioner's motion to subpoena the records of the Subcommittee (J.A. 8–10) asked, *inter alia*, for the production of all written information in the files of the Judiciary Committee or the Subcommittee (including confidential material) related to petitioner and Marcella Hitschmannova. The trial court granted the government's motion to quash (J.A. 49). In addition, during his cross-examination of the Subcommittee counsel, petitioner's counsel asked for the witness to produce materials he had concerning an airplane flight by petitioner outside the United States, on which, according to the information of the Subcommittee, he was accompanied by a Communist Party courier (J.A. 97; see J.A. 54–55). This request was denied on the ground it sought the disclosure of confidential information (J.A. 97). In addition, petitioner's counsel renewed his motion, which was again denied, for all material in the Subcommittee's files relating to Marcella Hitschmannova (J.A. 97). Petitioner sought, through these motions, to obtain evidence showing the absence of probable cause to subpoena petitioner and the lack of any legislative purpose in the hearings (J.A. 48).

The Subcommittee counsel testified on direct examination concerning the information possessed by the Subcommittee which was the basis for subpoenaing petitioner (J.A. 51–55, 65). Petitioner's counsel cross-examined him extensively on this subject (J.A.

93–104). He received answers stating that the information received by the Subcommittee relating to Marcella Hitschmannova was both oral and written; that the oral information was received shortly before the executive session; that the Subcommittee had received other oral information concerning Miss Hitschmannova over a year previously; that the earlier information came to someone else on the Subcommittee and the later information to himself, the Subcommittee counsel; that written information concerning Miss Hitschmannova came to the Subcommittee more than a year before the executive session; that the written information had no signature; that the letter giving the Subcommittee information concerning Robert Shelton (the petitioner in No. 9, this Term) did not provide information as to petitioner here; that he (the Subcommittee counsel) knew the source of the written material; that the information stated that Miss Hitschmannova had been a courier for the Communist Party in Europe; that the Subcommittee had oral information concerning the contacts between her and petitioner; that this information was given to the Subcommittee counsel directly; that Miss Hitschmannova visited repeatedly the place where petitioner lived; that she had been connected with the United Nations; that petitioner had flown to Latin America and had been accompanied by a Communist courier; that this information was written; that the Subcommittee had files showing that petitioner had run on the Rank and File ticket for vice-president of the New York Newspaper Guild; that there were public allegations at the time of the election that the ticket

was supported by the Communist Party; and that he (the Subcommittee counsel) did not know whether petitioner was the William Price who had signed a statement in 1941 in the Daily Worker defending the Communist Party. The Subcommittee counsed refused to answer only ten questions, all of which concerned the precise identity of the Subcommittee's confidential informants, information which would have provided considerable indication of their identity, and information as to the manner in which the Subcommittee secured confidential information (J.A. 93–95, 98, 99, 100, 102). Thus, the only questions which the court allowed the Subcommittee counsel not to answer would have disclosed confidential information.

The issue here, as in *Shelton, supra,* and *Liveright, supra,* is whether a witness who refuses to answer questions asked by a Congressional committee is entitled to the disclosure of the files of the committee, either directly or by cross-examination of a government witness, before he can be punished for contempt. As in those cases (see our briefs in No. 9, pp. 59–60, and in No. 11, pp. 51–57), we submit that a witness is not entitled to this disclosure merely in the hope that these files will impeach the witness' testimony on an issue which is not even an element of the offense. In short, while this Court indicated in *Barenblatt,* 360 U.S. at 134, and *Wilkinson* v. *United States,* 365 U.S. 399, at 412, that a Congressional committee must present information showing that it had a reasonable basis for subpoenaing the witness, those cases did not require that the information or reasons which caused

the Committee to subpoena the witness be subject to plenary judicial review.

VIII

PETITIONER CANNOT CLAIM FOR THE FIRST TIME IN HIS BRIEF ON THE MERITS IN THIS COURT THAT THE SUBCOMMITTEE VIOLATED HIS RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS SINCE IT DID NOT HAVE PROBABLE CAUSE TO SUBPOENA HIM. IN ANY EVENT, PETITIONER'S RIGHTS WERE NOT VIOLATED

Petitioner claims (Pet. Br. 20–21) that his rights under the Fourth and Fifth Amendments were violated because the Subcommittee did not have probable cause to believe that he had information pertinent to its inquiry. Petitioner, however, never raised this contention prior to filing his brief on the merits in this Court. As we have shown in our brief in *Shelton, supra*, pp. 41–43, his failure to raise this issue before the Subcommittee [11] prevented him from raising it when he was tried for contempt. He again waived any contention he might have made—unless the error was "obvious"—by failing to raise the issue in the district court or the court of appeals. *E.g., United States* v. *Atkinson*, 297 U.S. 157, 159–160; *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 239; *Johnson* v. *United States*, 318 U.S. 189, 200. And finally, he did not raise the issue in his petition for a writ of certiorari in this Court. Under Rule 40(1)(d)(2) of the Rules of this Court he cannot raise the issue in his brief on the merits unless there was "plain error." *E.g., Kessler* v. *Strecker*, 307 U.S. 22, 34.

We submit that petitioner's contention, far from showing that his conviction was plainly erroneous, is

[11] See *supra*, pp. 6, 9, for the grounds on which petitioner relied.

without merit. As we show in our brief in *Shelton, supra*, pp. 43–46, the Fourth Amendment does not apply to subpoenas to testify as contrasted to subpoenas *duces tecum*. We further show (pp. 46–48) that, even if the Fourth Amendment does apply, this Court has held in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, that its restrictions on administrative subpoenas (with regard to subpoenas *duces tecum*) are not nearly so strict as with regard to arrests and searches and seizures. The only requirements are that "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry" (*id.* at 209). If the Fourth Amendment applies at all, we submit that this standard is applicable to subpoenas to testify as well as subpoenas *duces tecum*, and to Congressional committees as well as executive agencies.

Even if the Fourth Amendment does not apply to subpoenas to testify, this Court has indicated in *Barenblatt* v. *United States*, 360 U.S. 109, 134, *Braden* v. *United States*, 365 U.S. 431, 433–435, and *Wilkinson* v. *United States*, 365 U.S. 399, 412–413, that a Congressional committee investigating Communist activities cannot, consistent with the First Amendment, subpoena a witness "as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that [the witness] possessed information which might be helpful to the subcommittee" (365 U.S. at 412). As we contend in our brief in *Shelton*, pp. 50–55, those cases clearly do not apply the standard of probable cause for arrests or searches and seizures. Rather, they apply essentially the same standard as

was laid down for subpoenas *duces tecum* in the *Oklahoma Press* case.

Applying the above standards to the facts here, the Committee clearly had reasonable grounds to believe that petitioner "possessed information which might be helpful to the committee" and that was "relevant to the inquiry." The Subcommittee counsel testified in considerable detail concerning information possessed by the Subcommittee as to Communist activities in which petitioner engaged (see *supra*, p. 5). Thus, the Subcommittee had information that petitioner, admittedly a newspaperman, had run as a candidate for vice-president of the New York Newspaper Guild, which had been infiltrated by Communists, on the Communist-supported ticket; that petitioner had received numerous visits up until the time of the hearing from Marcella Hitschmannova, who was believed to be a Communist courier and otherwise active in the Communist movement for years; and that petitioner had flown an airplane to Latin America accompanied by a courier for the Communist Party. Thus, even though the Subcommittee had no direct information that petitioner was a member of the Communist Party, it had basis for believing that petitioner had information concerning Communist activities in the United States and, more specifically, concerning the subject under inquiry when petitioner testified, *i.e.*, Communist activities in news media.

As to petitioner's claim under the Fifth Amendment, he expressly did not claim that his answers would incriminate him (J.A. 21). Apparently, peti-

tioner is relying on the due process clause. But he cites no authority for the proposition that this clause limits the power of Congressional committees to issue subpoenas to testify. In any event, it certainly provides no stricter a standard than that provided by the Fourth Amendment (if it applies) and by the First Amendment—that is, whether the committee has reasonable basis for believing that the witness has information of value in its investigation. And, as we have seen, the Subcommittee had such information here.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

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